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U S SUPREME COURT
REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

JANUARY TERM 1830.

BY RICHARD PETERS.

COUNSELLOR AT LAW AND REPORTER OF THE DECISIONS OF THE SUPREME COURT
OF THE UNITED STATES.

VOL. III.

Philadelphia:
JOHN GRIGG, No. 9, NORTH FOURTH STREET.
1830.

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Eastern District of Pennsylvania, to wit:
Be it remembered, that on the eighth day of June, in the fifty-fourth year of the independence of the United States of America, A.D. 1830, Richard Peters, of the said district, has deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

Reports of Cases argued and adjudged in the Supreme Court of the United States. January Term 1830. By Richard Peters. Counsellor at Law, and Reporter of the Decisions of the Supreme Court of the United States. Vol. III.

In conformity to the act of the congress of the United States, entitled, "an act for the encouragement of learning, by securing the copies of maps, charts and books to the authors and proprietors of such copies during the times therein mentioned;" and also to the act, entitled, "an act supplementary to an act, entitled, 'an act for the encouragement of learning, by securing the copies of maps, charts and books to the authors and proprietors of such copies during the times therein mentioned,' and extending the benefit thereof to the arts of designing, engraving and etching historical and other prints."

D. CALDWELL,
Clerk of the Eastern District of Pennsylvania.

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REPRINTED IN TAIWAN

IT has been found impracticable to include in one volume all the Cases decided by the Supreme Court at January term 1830. The Reporter was desirous to escape from the labour of preparing two volumes for the press, and still more desirous to avoid imposing upon the profession the double expense of the purchase of the Cases in this form.

In his vindication, and in explanation of the course which has been adopted, he has been indulged with the permission of the Court to publish the following correspondence.

*Washington, March 20, 1830.
Supreme Court Room.*

My Dear Sir,

I am exceedingly embarrassed on the subject of the publication of the Reports of the Cases decided at this term, and submit myself to the Court for direction.

It is manifest that it will be impossible to comprehend the whole of the decisions, *with the arguments of counsel*, in one volume, of a size which will be convenient, and executed on a type such as is proper for the work. Should it be desired by the Court, I am willing to publish two volumes, introducing in most of the cases *the arguments of counsel*: indeed more than half the cases are now ready for the press, *the arguments included*; having intended to pursue the plan heretofore adopted. But the objection to this is,

that the profession may consider the expense of two volumes a burthen, and may complain. With the approval of the Court, and their expression of a wish that the arguments shall be reported, I shall be entirely protected. If the Court shall recommend or sanction the *omission* of the arguments, I shall be also safe from the censure of those gentlemen whose ability in the discussion of the cases which have been disposed of during the term entitles them to every illustration, and whose arguments it would, under other circumstances, give me great pleasure to insert in the work.

I have no desire so present the case in any form which can be construed as intending a claim on the government for additional compensation for delivering to the department of state, *two volumes* instead of *one*; and I wish to be understood as relinquishing any such claim or purpose. My whole object is to act in the matter as the court shall wish, and I shall have full compensation for any addition to my labours in their approbation. I am, sir, with great respect and esteem,

Your obedient servant, faithfully,
RICHARD PETERS.

MR CHIEF JUSTICE MARSHALL.

Washington, March 22d.

My Dear Sir,

I laid your letter before the Court, and found a general disposition among the Judges to approve of the course which you should yourself think most eligible. I believe we all think that the arguments at the bar ought, at least in substance, to appear in the Reports. They certainly contribute very much to explain the points really decided by the Court. If this cannot be done in one volume, I should think it advisable to give us two. With great respect and esteem, I am, dear sir,

Your obedient,
J. MARSHALL.

RICHARD PETERS, Esq.

OBITUARY.

THE obligation to record the decease of Mr Justice WASHINGTON is felt with the deepest sensibility. Associations of years, during which it was the good fortune of the writer to possess his friendship and esteem, were thus terminated : his judicial career, of thirty-one years, distinguished by all the lustre and usefulness that talent, learning and virtue could give, was closed by that event. He died at Philadelphia, on the 26th day of November 1829, in the sixty-eighth year of his age ; and his remains were conveyed to Mount Vernon, and deposited in the same tomb with those of his uncle ; THE FATHER OF HIS COUNTRY.

It may be said with truth that Mr Justice Washington belonged to two states—Virginia and Pennsylvania. He was born and educated in Virginia, and there, for some time, practised his profession : he acquired his knowledge of the law in Pennsylvania ; in that state the great portion of his eminent judicial labours were performed ; and in that state he died. He was equally beloved, honoured, and lamented in both states.

Mr Justice Washington was the son of John A. Washington, Esquire, of Westmoreland county, Virginia, who was the next eldest brother of general Washington. His father was a gentleman of strong mind, and possessed the consideration and confidence of all who knew him. He was, with honour to himself, a delegate in the state legislature of Vir-

ginia, and a magistrate of the county in which he resided. Bushrod Washington, his son, received a part of his classical education in the house of the inflexible patriot Richard Henry Lee, under a private tutor; his studies were continued under his paternal roof, and afterwards at William and Mary College. At that respectable institution commenced his intimacy and friendship with Mr Chief Justice Marshall, with whom he became afterwards associated in the Supreme Court of the United States; and whose esteem, confidence and respect, he continued to possess, in the fullest extent, to the close of his life.

The invasion of Virginia, by lord Cornwallis, called from their studies, for its defence, the gallant youth of the state, and among them Bushrod Washington, who joined a volunteer troop of cavalry, under colonel John F. Mercer, in the army commanded by the marquis La Fayette. During the whole of the summer he remained in the field, and until Cornwallis had crossed James River. It was then supposed that the invaders intended to move on South Carolina; the troop was disbanded, and its members returned to their homes. In the following winter he came to Philadelphia, and, under the auspices and affectionate care of general Washington, he was placed, as a student at law, in the office of Mr Wilson; a gentleman of great legal learning and high character, and who was afterwards appointed a justice of the supreme court of the United States. After completing his studies, he returned to Virginia, and practised his profession in his native county with reputation and success. In 1787, he was chosen a member of the house of delegates of Virginia; and the following year, as one of that body, he assisted in the adoption and ratification of the constitution of the United States by the state of Virginia.

From Westmoreland he removed to Alexandria, a wider sphere for the exercise of his talents as an advocate and a jurist; and he went afterwards from thence to Richmond,

and there assumed and maintained an equal station with the gentlemen of that bar; whom to equal, has always been and continues to be conclusive evidence of the highest professional attainments and character.

During his arduous, industrious and extensive practice at the bar in Richmond and throughout the state, Judge Washington undertook to report the decisions of the supreme court of Virginia; a work in two volumes, of high authority in the courts of that state, and in those of the union.

He was married in 1785 to Miss Blackburn; he had no children. He was a devoted husband, to an affectionate wife; and such was the strength of her conjugal attachment to her deceased husband, that she survived him but three days.

His high and just reputation as a lawyer, the purity and integrity of his character, and the confidence and respect of the whole community with whom he lived, induced President Adams, in 1798, to appoint him an associate justice of the supreme court of the United States, to fill the vacancy which had occurred by the decease of Mr Justice Wilson. He continued to hold that honoured and honourable station until his death; and presided in the circuit court of New Jersey and in that of Pennsylvania from April 1803, having been during that year assigned to the circuit courts composing the third circuit.

Judge Washington was the favourite nephew of President Washington, and the devisee of Mount Vernon; the much loved residence of that pure, distinguished and venerated patriot. To Judge Washington he also gave his library, and he also bequeathed to him his public and private papers; at the same time appointing him one of his executors. These high and affectionate testimonials of confidence and esteem must have ever been held in proud possession by him on whom they were bestowed, and by whom they were deserved.

It is with peculiar satisfaction that the writer has been permitted by Mr Justice Story to introduce here his evidence of the talents, the usefulness, the qualifications and the virtues of Mr Justice Washington. This was given in a notice written by him immediately after that occurrence. *Laudari a viro laudato.*

"For thirty-one years Judge Washington held the station of justice of the supreme court, with a constantly increasing reputation and usefulness. Few men, indeed, have possessed higher qualifications for the office, either natural or acquired. Few men have left deeper traces in their judicial career of every thing, which a conscientious judge ought to propose for his ambition or his virtue or his glory. His mind was solid, rather than brilliant; sagacious and searching, rather than quick or eager; slow, but not torpid; steady, but not unyielding; comprehensive and at the same time cautious; patient in inquiry, forcible in conception, clear in reasoning. He was, by original temperament, mild, conciliating, and candid; and yet was remarkable for an uncompromising firmness. Of him it may be truly said, that the fear of man never fell upon him; it never entered into his thoughts, much less was it seen in his actions. In him the love of justice was the ruling passion,—it was the master spring of all his conduct. He made it a matter of conscience to discharge every duty with scrupulous fidelity; and scrupulous zeal. It mattered not, whether the duty were small or great, witnessed by the world or performed in private; every where the same diligence, watchfulness and pervading sense of justice were seen. There was about him a tenderness of giving offence, and yet a fearlessness of consequences in his official character, which it is difficult to portray. It was a rare combination, which added much to the dignity of the bench, and made justice itself, even when most severe, soften into the moderation of mercy.

It gained confidence, when it seemed least to seek it. It repressed arrogance by overawing or confounding it.

"To say, that as a judge he was wise, impartial, and honest, is but to attribute to him those qualifications, without which the honours of the bench are but the means of public disgrace or contempt. His honesty was a deep vital principle, not measured out by worldly rules. His impartiality was a virtue of his nature, disciplined and instructed by constant reflection upon the infirmity and accountability of man. His wisdom was the wisdom of the law, chastened and refined and invigorated by study, guided by experience, dwelling little on theory, but constantly enlarging itself by a close survey of principles.

"He was a learned judge. Not in that every day learning, which may be gathered up by a hasty reading of books and cases. But that, which is the result of long, continued, laborious services, and comprehensive studies. He read to learn, and not to quote; to digest and master, and not merely to display. He was not easily satisfied. If he was not as profound as some, he was more exact than most men. But the value of his learning was, that it was the keystone of all his judgments. He indulged not the rash desire to fashion the law to his own views; but to follow out its precepts, with a sincere good faith and simplicity. Hence he possessed the happy faculty of yielding just the proper weight to authority; neither on the one hand surrendering himself to the dictates of other judges, nor on the other hand overruling settled doctrines upon his own private notions of policy or justice.

"But it is as a man, that those, who knew him best, will most love to contemplate him. There was a daily beauty in his life, which won every heart. He was benevolent, charitable, affectionate and liberal in the best sense of the terms. He was a Christian, full of religious sensibility and religious humility. Attached to the Episcopal

church by education and choice, he was one of its most sincere, but unostentatious friends. He was as free from bigotry, as any man ; and at the same time that he claimed the right to think for himself, he admitted without reserve the same right in others. He was, therefore, indulgent even to what he deemed errors in doctrine, and abhorred all persecution for conscience' sake. But what made religion most attractive in him, and gave it occasionally even a sublime expression, was its tranquil, cheerful, unobtrusive, meek and gentle character. There was a mingling of Christian graces in him, which showed that the habit of his thoughts was fashioned for another and a better world."

At the session of the Supreme Court at January term 1830, Mr Berrien, the attorney general of the United States, moved the court to have the proceedings of the bar and officers of the court, expressive of their high sense of the merits and talents of Mr Justice Washington, entered on the record of the court. Mr Chief Justice Marshall said :

"The sentiments of respect and affection which the gentlemen of the bar and the officers of the court have expressed for the loss of our deceased brother, are most grateful to me, and I can say, with confidence, to all my brethren. No man knew his worth better or deplores his death more than myself ; and this sentiment, I am certain, is common to his former associates. I am very sure, I may say for my brethren, as well as for myself, that the application is most gratifying to us all ; and that in ordering the resolutions to be entered on the minutes of our proceedings, we indulge our own feelings not less than the feelings of those who make the application."

Immediately on the decease of Mr Justice Washington, the bar of Philadelphia assembled to testify their sense of the loss sustained in his decease by the court and by the nation. Resolutions expressive of their sentiments and feelings were unanimously adopted, and a gentleman of high

attainments and station was requested to pronounce an eulogium on the deceased.

The bar of the circuit court of the United States, for the eastern district of Pennsylvania, have caused to be placed a mural tablet of marble, in a recess immediately behind and above the seat of the judges, in the room lately arranged for the circuit court, in the "Hall of Independence," in the city of Philadelphia; on which is inscribed:

THIS TABLET
Records
The affection and respect of
The Members of the Philadelphia Bar,
for
BUSHROD WASHINGTON,
An Associate Justice of the Supreme Court of the United States :
Alike distinguished for
Simplicity of Manners,
and
Purity of Heart :
Fearless, dignified, and enlightened, as a Judge ;
No influence or interest
could touch his integrity,
or
Bias his Judgment :
A zealous patriot, and a pious Christian.
He died
At Philadelphia,
On the 26th of November, A.D. 1829 ;
Leaving
To his professional brethren,
A spotless fame ;
And to his country,
The learning, labour and wisdom
of a
Long judicial Life.



SUPREME COURT OF THE UNITED STATES.

Hon. JOHN MARSHALL, Chief Justice.

Hon. WILLIAM JOHNSON, Associate Justice.

Hon. GABRIEL DUVALL, Associate Justice.

Hon. JOSEPH STORY, Associate Justice.

Hon. SMITH THOMPSON, Associate Justice.

Hon. JOHN M'LEAN, Associate Justice.

Hon. HENRY BALDWIN, Associate Justice.

JOHN M'PHERSON BERRIEN, Esq. Attorney General.

TENCH RINGGOLD, Esq. Marshal.

WILLIAM THOMAS CARROLL, Esq. Clerk.

RULES AND ORDERS

OF

THE SUPREME COURT OF THE UNITED STATES.

11 February 1830. There having been two Associate Justices of the Supreme Court appointed since its last session : it is ordered, that the following allotment be made of the Chief Justice and the Associate Justices of the said Supreme Court among the Circuits, agreeably to the act of congress in such case made and provided, and that such allotment be entered on record, viz.

For the first Circuit, the Hon. Joseph Story.

For the second Circuit, the Hon. Smith Thompson.

For the third Circuit, the Hon. Henry Baldwin.

For the fourth Circuit, the Hon. Gabriel Duvall.

For the fifth Circuit, the Hon. John Marshall, Ch. Justice.

For the sixth Circuit, the Hon. William Johnson.

For the seventh Circuit, the Hon. John M'Lean.

March 1830. The Court on the second day in each term, hereafter, will commence calling the cases for argument, in the order in which they stand on the docket, and proceed from day to day during the term, in the same order ; and if the parties or either of them shall be ready when the case is called, the same will be heard ; and if neither party shall be ready to proceed in the argument, the cause shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court. That ten causes only shall be considered as

liable to be called on each day during the term, including the one under argument, if the same shall not be concluded on the preceding day. No cause shall be taken up out of its order on the docket, or be set down for any particular day; except under special and peculiar circumstances, to be shown to the court. Every cause which shall have been twice called, in its order, and passed, and put at the foot of the docket, shall, if not again reached during the term it was last called, be dismissed, and no longer continued on the docket.

12 August 1796. Ordered, that when process at common law, or in equity, shall issue against a state, the same shall be served on the governor, or chief executive magistrate, and attorney general of such state*.

Montalet vs. Murray, February Term 1806. MARSHALL, C. J. stated the practice of the court to be, that when there is no appearance for the plaintiff in error, the defendant may have the plaintiff called, and dismiss the writ of error; or may open the record and pray for an affirmance. In such a case *costs* go of course*.

* These rules of court have been omitted in 1 Wheaton, 1 Peters, and 1 Condensed Reports. This omission arose from the fact that they were not regularly entered, with the other rules of court, by the then clerk of the court, at the time of their adoption.

*The following Gentlemen were admitted to practice at the
Bar of the Supreme Court of the United States, at Jan-
uary Term 1830.*

Greene C. Bronson,	New York.
Daniel Lord, Jun.	New York.
Washington Quincy Morton,	New York.
Henry B. Cowles, M. C.	New York.
Stephen Fales,	Ohio.
A. Blanding,	South Carolina.
Elias Kent Kane, M. C.	Illinois.
Andrew Dunlap,	Massachusetts.
James M. Wayne, M. C.	Georgia.
John Waller Overton,	Tennessee.
E. H. Cummins,	District of Columbia.
John H. B. Latrobe,	Maryland.
Zadok Magruder,	Maryland.
Lemuel Warner Ruggles,	District of Columbia.
Charles S. Williams,	District of Columbia.
John A. Carter,	Maryland.
Asa Child,	Connecticut.
John I. Wurtz,	Pennsylvania.
B. F. Bailey,	Vermont.
Dexter Randall,	Rhode Island
Philemon Dickerson,	New Jersey.
Lewis Maxwell, M. C.	Virginia.
William W. Irvin, M. C.	Ohio.
Charles G. De Witt, M. C.	New York.
Preston S. Longborough,	Kentucky.
Robert Monell, M. C.	New York.
George M. Gill,	Maryland.
N. D. Coleman,	Kentucky.
C. G. Memminger,	South Carolina
Charles S. Hempstead,	Missouri.
Archibald Randall,	Pennsylvania
W. W. Fetterman,	Pennsylvania
Alexander Wurtz,	New Jersey.
John Moore White,	New Jersey.
John J. Chetwood,	New Jersey.
James S. Nevins,	New Jersey.
Luke Edward Lawless,	Missouri.
Robert Bogardus,	New York.
John L. Tillinghast,	New York.
Russell Jarvis,	Massachusetts
Arthur L. Magenis,	Missouri.
Samuel Jackson Hays	Tennessee
Henry S. Geyer.	Missouri

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THE DECISIONS

OF

THE SUPREME COURT OF THE UNITED STATES

AT

JANUARY TERM 1830.

RICHARD R. KEENE, PLAINTIFF IN ERROR vs. MARGARET MEADE,
EXECUTRIX OF RICHARD W. MEADE, DECEASED, DEFENDANT IN
ERROR.

A commission was issued in the name of Richard *M.* Meade, the name of the defendant being Richard *W.* Meade. This is a clerical error in making out the commission, and does not affect the execution of the commission. [6] It may well be questioned whether the middle letter of a name forms any part of the christian name of a party. It is said the law knows only of one christian name, and there are adjudged cases strongly countenancing, if not fully establishing, that the entire omission of a middle letter is not a misnomer or variace. [7]

A witness, the clerk of the plaintiff, examined under a commission, stated the payment of a sum of money to have been made by him to the defendant, and that the defendant at his request made an entry in the plaintiff's rough cash book, writing his name at full length, and stating the sum paid to him, not so much for the sake of the receipt, as in order for him, the witness, to become acquainted with his signature, and the way of spelling his name. It is not necessary to produce the book in which the entry was made, and parol evidence of the payment of the money is legal. It cannot be laid down as a universal rule, that where written evidence of a fact exists, all parol evidence of the same fact is excluded. [7]

It is not known that there is any practice in the execution or return of a commission, requiring a certificate, in whose hand writing the depositions returned with the commission were taken down. All that the commission requires is,

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SUPREME COURT.

[Keene vs. Meade.]

that the commissioners, having reduced the depositions taken by them to writing, shoud send them with the commission under their hands and seals to the judges of the court out of which the commission issued. But it is immaterial in whose hand writing the depositions are; and it cannot be required that they should certify any immaterial fact. [8]

A certificate by the commissioners, that A. B. whom they were going to employ as a clerk had been sworn, admits of no other reasonable interpretation than that A. B. was the person appointed by them as clerk. [9]

It is not necessary to return with the commission the form of the oath administered by the commissioners to the witnesses. When the commissioners certify, the witnesses were sworn, and the interrogatories annexed to the commission were all put to them, it is presumed that they were sworn and examined as to all their knowledge of the facts. [10]

ERROR to the circuit court for the county of Washington in the district of Columbia.

In the circuit court the testator of the defendant in error Richard W. Meade, instituted an action against Richard R. Keene, the plaintiff in error, for money lent and advanced to him in Spain, where Mr Meade, at the time of the loan, resided, and carried on business as a merchant. In order to establish the claims of the plaintiff below, a commission was issued to Cadiz; and under the same, certain depositions were taken, which were returned with the commission. The commission was directed to the commissioners in a case stated to be depending in the court in which Richard M. Meade was plaintiff, and Richard R. Keene defendant; and it was returned to the court under the hands and seals of the commissioners, who certified that the "execution of the commission appears in a certain schedule annexed."

In the schedule annexed to the commission was also the following certificate under the hands of the commissioners.

"We the undersigned, appointed commissioners to examine evidences in a cause depending in the circuit court of the county of Washington in the district of Columbia, between Richard W. Meade plaintiff, and Richard R. Keene defendant, do hereby certify that we have severally taken the oath into the hands of each other prescribed in the herein annexed commission, and we further certify that we have likewise administered the oath prescribed by the same herein annexed commission, to Mr James M'Cann, the clerk we are going to employ for the execution of the same."

[Keene vs. Meade.]

The commission "required the commissioners, or a majority of them, to cause to come before them all such evidences as shall be named or produced to them by either the plaintiff or defendant; and to examine them on oath touching their knowledge or remembrance of any thing relating to the cause." The record does not show that any interrogatories were annexed to the commission.

The commissioners also certify as to the execution of the commission in the following words. "We the undersigned do certify that, in compliance with our duty, we shall examine the witnesses upon the following interrogatories, which we deem necessary first to establish."

Interrogatories returned with the commission, were then administered to the witnesses, and the separate answers to each written and returned.

Frederick Rudolph, who was the clerk and book keeper of Mr Meade, testified as to one of the items of the account, "that on the defendant's receiving two hundred and fifty dollars, the defendant himself made the entry thereof in the rough cash book, writing his name at full length, probably at my own request, not so much for the sake of the receipt, as in order for me to become acquainted with his signature, and the way of spelling his name."

On the trial of the cause, the counsel for the defendant objected to the reading of the commission on the ground of a variance in the name of the plaintiff in the commission, the plaintiff being called Richard *M.* Meade, instead of Richard *W.* Meade. This objection was overruled by the court; the defendant's counsel also objected to the deposition of F. Rudolph, so far as the same went to prove the item of \$250 in the plaintiff's account; alleging as the ground of the objection, that as there was a written acknowledgement made by the defendant, the writing should be produced, and the same could not be proved by parol. The plaintiff by his counsel offered to withdraw, and stated that he withdrew and waived that part of the deposition which went to prove the existence of a written acknowledgement or receipt, and he relied only on the proof of the actual payment of the amount

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paid by the witness. The court overruled the objection and permitted the evidence to be read.

The defendant by his counsel also objected to the reading of the depositions returned with the commission, because the commissioners had not certified in whose hand writing the depositions were taken down, nor that they had appointed a clerk, nor administered the oath to their clerk, as required by the said commission; nor that the said witnesses were required to testify all their knowledge or remembrance of any thing that may relate to the said cause; nor that they were sworn so to do, but were examined on particular interrogatories propounded by the commissioners themselves. But the court overruled the objections, and permitted the depositions to be read in evidence to the jury, &c.

The defendant's counsel excepted to the opinion of the court, on the objections made to the evidence, and the court sealed a bill of exceptions: upon which the defendant prosecuted this writ of error.

Mr Key, for the plaintiff in error, contended, that as there was written evidence of the payment of the sum of \$250, it should have been produced; and that in its absence, no allegation of its loss having been made, parol proof of its contents could not be given. The entry in the book was the original and superior evidence.

The offer of the plaintiff's counsel to strike out that part of the deposition of Rudolph which referred to the written entry, did not prevent the influence of the fact that such evidence existed, nor deprive the defendant of his right to its production.

As to the misnomer of the plaintiff, he argued that the commission was an ex parte proceeding, and a strict scrutiny of it is warranted and demandable. The misnomer shows a different plaintiff from the real plaintiff in the cause.

He objected to the execution of the commission, as it did not appear that the interrogatories were those of the parties to the cause, but had been framed and put by the commissioners, without notice of the same. Nor did it appear that

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the clerk, who was sworn, wrote down the examinations of the witnesses; the certificate stating only that the clerk was sworn, whom the commissioners "were about to employ." The clerk does not attest the depositions.

He also contended that the other matters stated in the court below were legal objections to the commission. Cited 5 Har. and John. 438.

Mr Lee and Mr Jones, for the defendant in error, maintained, that the objections made by the plaintiff in error were merely technical, and such as were exclusively in the power of the circuit court. This court has decided against such objections as ground of error. 7 Cranch, 208.

As to the variance, it was said it was immaterial; or if material, should have been the subject of a plea; and if it had been pleaded, the plaintiff could have cured the defect by an averment that the person named in the commission and the plaintiff were the same. Cited 5 Bac. Ab. 215. 1 Wash. Rep. 257. 1 T. R. 235.

The evidence of Rudolph was not to prove the contents of the memorandum, but the advance of the money by the witness as the plaintiff's agent. The entry in the book was but secondary evidence of the payment; and to claim that the whole of the account book should have been annexed to the commission was unreasonable; and yet it must have been so annexed, if the position of the plaintiff in error is correct.

It was also contended, that upon a fair construction of the certificate of the commissioners, the execution of the commission was legal and proper.

Mr Justice THOMPSON delivered the opinion of the Court.

This case comes up on a writ of error to the circuit court of the district of Columbia, and the questions for decision grow out of bills of exception taken at the trial, and relate to the admission of evidence offered on the part of the plaintiff, and objected to by the defendant.

The first objection was to the admission of the depositions taken under a commission issued under a rule or order of the court below, on the ground of a variance in the name of

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the testator Meade, as set out in the commission, from that stated in the title of the cause. The commission purports to be in a cause between Richard *M.* Meade plaintiff, and Richard R. Keene defendant, whereas the name of the plaintiff is Richard *W.* Meade. The whole variance therefore consists in the use of *M* instead of *W*, the middle letter in the plaintiff's name. This objection, we think, was properly overruled. It was a mere clerical mistake in making out the commission. The rule or order of the court for the commission was in the right name, Richard *W.* Meade; and the oath taken by the commissioners, and administered to the clerk and the witnesses who were examined, and all the proceedings under the commission were in the cause according to its right title. It was a mistake of the officer of the court, which the court on motion might have corrected on the return of the commission. It may be regarded as mere matter of form, and which has not in any manner misled the parties. And indeed it may well be questioned whether the defendant was at liberty to raise this objection. It has been urged at the bar, that this was an *ex parte* commission, taken out by the plaintiff, and that the defendant has therefore waived nothing. But the record now before this court warrants no such conclusion. The mode and manner of taking out the commission is governed and regulated by the practice of the court below, and of which this court cannot judge. From the commission itself, and the interrogatories upon which the witnesses were examined, it would appear to have been a joint commission. The commissioners are required to examine all witnesses named or produced to them, either by the *plaintiff* or the *defendant*. And one of the interrogatories put to the witnesses was, do you know of any sum or sums of money paid by the *defendant* to the plaintiff, in money, bills, or merchandizes, which are not credited in the amount now before you. It can hardly be presumed, that such an interrogatory would have been put by the plaintiff. It was to elicit matter of defence, and which concerned the defendant only. The motion for the commission having been made by the plaintiff, would not preclude the defendant from after-

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wards joining in it with the consent of the plaintiff. And if it is to be viewed as a joint commission, the alleged mistake may be considered as made by both parties, and not to be taken advantage of by either; and besides, it may well be questioned whether the middle letter formed any part of the christian name of Meade. It is said the law knows only of one christian name. And there are adjudged cases strongly countenancing, if not fully establishing, that the entire omission of a middle letter is not a misnomer or variance (Lit. 3, a. 1 Lord Ray. 563. 5 Johns. 84. 4 Johns. 119, note a.); and if so, the middle letter is immaterial, and a wrong letter may be stricken out or disregarded.

The general objection to the testimony taken under the commission on account of the alleged variance having been overruled, the plaintiff's counsel read the deposition of F. Rudolph, which, in that part which went to prove the first item of \$250 in the plaintiff's account, states that the defendant made the entry on the plaintiff's rough cash book, himself; writing his name at full length, at his request, not so much for the sake of the receipt, as in order for him to become acquainted with his signature, and the way of spelling his name. The witness fully proved the actual payment of the money. But the defendant objected to such parol proof, as written evidence of the payment existed and should be produced. This objection we think not well founded. The entry of the advance made by the defendant himself, under the circumstances stated, cannot be considered better evidence, within the sense and meaning of the rule on that subject, than proof of the actual payment. The entry in the cash book did not change the nature of the contract arising from the loan, or operate as an extinguishment of it, as a bond or other sealed instrument would have done. If the original entry had been produced, the hand writing of the defendant must have been proved, a much more uncertain inquiry than the fact of actual payment. It cannot be laid down as a universal rule, that where written evidence of a fact exists, all parol evidence of the same fact must be excluded. Suppose the defendant had written a letter to the plaintiff acknowledging the receipt of the

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money, it certainly could not be pretended that the production of this letter would be indispensable, and exclude all parol evidence of the advance. And yet it would be written evidence. The entry made by the defendant in the cash book was not intended, or understood to be a receipt for the money, but made for a different purpose; and even if a promissory note had been given as written evidence of the loan, the action might have been brought for money lent, and this proved by parol. The note must have been produced on the trial; not however as the only competent evidence of the loan, but to be cancelled, so as to prevent its being put into circulation; a reason which does not in any manner apply to the present case. This objection has been argued at the bar, as if the court permitted the plaintiff to withdraw or expunge that part of the deposition which related to the written acknowledgement, in order to let in the parol evidence. But this view of it is not warranted by the bill of exceptions. This was offered to be done by the plaintiff's counsel, but no such permission was given by the court. The parol evidence was deemed admissible, notwithstanding the written entry of the advance. The parol evidence did not in any manner vary or contradict the written entry, and no objection could be made to it on that ground. Nor does the non-production of the written entry afford any inference, that, if produced, it would have operated to the prejudice of the plaintiff. Nor can it in any manner injure the defendant. The production of the written entry in evidence would not protect the defendant from another action for the same cause, as seemed to be supposed on the argument. The charge would not be cancelled on the book, but remains the same as before trial; and the defendant's protection against another action depends on entirely different grounds.

By the second bill of exceptions, several objections appear to have been taken to the reading of the depositions. These relate principally to the proceedings before the commissioners.

1. It is objected, that the commissioners have not certified in whose hand writing the depositions were taken down.

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We are not aware of any practice in the execution, and return of a commission, requiring such a certificate. And all that the commission requires is, that the commissioners, having reduced the depositions taken by them to writing, should send the same, with the commission, under their hands and seals, to the judges of the circuit court. But it is immaterial in whose hand writing the depositions are; and it cannot be required that they should certify any immaterial fact.

2. The second exception is, that the commissioners have not certified that they had appointed a clerk, and administered to him the oath required by the commission.

This exception does not appear to be sustained in point of fact.

The commission directs the commissioners to administer the annexed oath to the person whom they shall appoint as clerk. And they certify that they had administered the oath annexed to the commission to James McCann, the clerk they were going to employ for the execution of the same. This certificate admits of no other reasonable interpretation, than that the person named was the one appointed by them as clerk, and it states in terms, that the prescribed oath was administered to him. The inference from the certificate is irresistible that the person employed as the clerk was the one to whom the oath was administered. And this is all the commission required. If employed as clerk, it follows of course that he must have been appointed as such. If objections like this are to set aside testimony taken under a commission, but very few returns will stand the test.

3. The third exception is that the witnesses were not required to testify all their knowledge and remembrance of any thing that related to the said cause.

The commission does not prescribe the form of oath, but directs generally, that the witnesses produced should be examined upon their corporal oaths, to be administered by the commissioners, touching their knowledge or remembrance of any thing that may relate to the cause aforesaid.

The commissioners do not certify what oath was adminis-

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tered to the witnesses. But by way of caption to the interrogatories, state, that in compliance with our duty, we shall examine the witnesses upon the following interrogatories, which we deem necessary first to establish. This form of expression may not be very accurate or intelligible. It may probably arise from what is required of the commissioners by their own oath, which is to examine the witnesses upon the interrogatories *now*, or which may hereafter, before the said commission is closed, be produced to, and left with the commissioners, by either of the said parties. The interrogatories which followed this caption, were probably those which the commissioners had before them when the examination commenced; and if so, it was proper for them first to examine the witnesses upon those interrogatories, leaving the examination open to such other interrogatories as might be submitted to them before the commission closed. But whatever might be the reason for this particular form of expression, it is not perceived that it warrants any conclusion, that a proper oath was not administered to the witnesses. It cannot be presumed that these interrogatories were framed by the commissioners. It would be against the usual course of taking testimony on a commission; and, in the absence of any evidence to the contrary, we must assume that these interrogatories were framed by the parties in the ordinary course of such proceedings. And if this was a joint commission, as there is reasonable grounds to conclude it was, the interrogatories put to the witnesses did require them to testify as to all their knowledge of any thing that related to the cause, or at all events to whatever the parties supposed related to it. And the commissioners expressly certify in their return, that the witnesses produced and examined were sworn. The form of the oath administered to the witnesses is not set out in the return, nor is it necessary that it should be; and there is nothing from which the court can infer that the proper oath was not administered.

There is therefore no well-founded objection taken to the execution of this commission, and the depositions were pro-

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perly admitted in evidence. The judgment of the court below is accordingly affirmed.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: on consideration whereof, it is considered, ordered, and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

THE UNITED STATES, PLAINTIFFS IN ERROR vs. THOMAS BUPORD,
DEFENDANT IN ERROR.

When money of the United States has been received by one public agent from another public agent, whether it was received in an official or private capacity, there can be no doubt but that it was received to the use of the United States; and they may maintain an action against the receiver for the same. [28]

B. a deputy commissary general of the United States received from M. a deputy quarter master general of the United States the sum of \$10,000, and acknowledged the same by a receipt signed by him with his official description. The United States had a right to treat M. as their agent in the transaction, by making B. their debtor, and to an action brought against him for money had and received, the statute of limitations is no bar. [29]

An account stated at the treasury department which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of congress. A treasury statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books. In these cases the officers may well certify, for they must have official knowledge of the facts stated. [29]

But when moneys come into the hands of an individual, not through the officers of the treasury, or in the regular course of official duty, the books of the treasury do not exhibit the facts, nor can they be known to the officers of the department. In such a case the claim of the United States for money thus in the hands of a third person must be established, not by a treasury statement, but by the evidence on which that statement was made. [29]

In England any instrument or claim, though not negotiable, may be assigned to the king, who can sue upon it in his own name. No valid objection is perceived against giving the same effect to an assignment to the government of this country. [30]

Where, before the transfer to the United States of an instrument which was the evidence of debt, the term of five years had elapsed, the period after which the statute of limitations was a bar, it can require no argument to show that the transfer of such claim to the United States cannot give it any greater validity than it possessed before the transfer. [30]

In the correct order of pleading it is necessary, that the facts of the plea should be traversed by the replication, unless matter in avoidance be set up. It is not sufficient that the facts alleged in the replication be inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea. [31]

This court has repeatedly decided, that the exercise of the discretion of the court below, in refusing or granting amendments of pleadings or motions for new trials, affords no grounds for a writ of error. In overruling a motion for leave to withdraw a replication and file a new one, the court exercised its discretion; and the reason assigned, as influencing that discretion, cannot affect the decision. [31]

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ERROR to the circuit court of Kentucky.

The United States instituted an action of assump~~s~~it in the circuit court of Kentucky, to recover the sum of ten thousand dollars from the defendant, which they alleged to have been received by him to their use. The claim of the United States arose under the following circumstances.

On the 21st December 1812, at Lexington, Kentucky, James Morrison, a deputy quarter master general of the army of the United States paid to the defendant in error, Thomas Buford, then a deputy commissary of the United States, the sum of ten thousand dollars, and took from Mr Buford a receipt for the same, in the following words:

Lexington, 21st December 1822.

Received of James Morrison, deputy quarter master general, ten thousand dollars, for which sum I promise to account when called upon.

THOS. BUFORD,
Deputy Commissary, U. S. A.

Upon the settlement of his account with the United States, Mr Morrison claimed a credit for the sum thus paid to Mr Buford, which credit was refused to him; and afterwards, on the 3d March 1823, congress passed an act "for the relief of James Morrison," by which the accounting officers of the treasury were authorised to allow to him in the settlement of his accounts, the sum so advanced to Mr Buford, "provided that the said James Morrison shall first assign and transfer to the United States, all his right and claim to the moneys mentioned in a certain receipt given by the said Thomas Buford to the said James Morrison, bearing date the 21st day of December 1812," with a proviso, that if James Morrison should not be found indebted to the United States the whole of the amount so to be assigned, the balance should be repaid to him.

On the 7th of March 1823, James Morrison made the following assignment to the United States, in compliance with the act of congress:

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"Now I, James Morrison, in pursuance of the provisions of the said law, do hereby assign and transfer to the said United States, all my right and claim to the moneys mentioned in the said receipt. Witness my hand and seal, this 7th day of March 1823.

"JAMES MORRISON."

Test. H. CLAY,
A. D. HARDIN.

Upon the execution of this assignment, and the surrender of the receipt, the following account was made out, and certified at the treasury of the United States.

Dr Thomas Buford, late Deputy Commissary, in account with the U. S. Cr.

GENERAL ACCOUNT OF ARREARAGES.

To James Morrison, for amount received from him per receipt 21st December 1812, for which he is accountable,	\$10,000	By balance due U. States,	\$10,000
To balance per contra,	<u>\$10,000</u>		

TREASURY DEPARTMENT, 3d Auditor's Office, March 7th, 1823.

Stated by

RD. BURGESS.

Pursuant to the provisions of the act of congress, passed 3d March 1817, entitled an act to provide for the prompt settlement of public accounts, a transcript of the account so stated and settled was certified, for the purpose of maintaining a claim on Thomas Buford for the balance which thus appeared to be due to the United States.

In August 1823, the attorney of the United States filed a declaration in the suit, in the district court of Kentucky, for money had and received, which declaration set forth, "that the defendant, on the 10th day of March 1823, was indebted to the United States in the sum of ten thousand dollars, for so much money before that time had and received as an officer of the United States to their use, as by the account of the said defendant with the said United States, duly settled, examined and adjusted at the treasury

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department, on the said 10th day of March 1823, and to the court shown, duly certified according to the act of congress of the United States, in such case made and provided, fully appears."

To this declaration the defendant pleaded,

1. After oyer of the account; that the plaintiffs *actio non*, because "the declaration and the matters and things therein contained are not good and sufficient in law to have and maintain the said action," &c.

2. Because he does not owe the debt in the declaration mentioned and demanded, &c.

3. Because James Morrison, the assignor of the receipt and demand to the said plaintiffs, was, at the time of and before said assignment, and remained until the time of his death, indebted to him in a much larger sum of money than the said sum demanded, for money had and received by said Morrison, to the use and benefit of said defendant; for money before that time lent and advanced at his special instance and request; for money paid, laid out and expended, at his like special instance and request: and being so indebted, said Morrison assumed upon himself and promised to pay said defendant the aforesaid sum of money, whenever he should be thereunto afterwards requested; yet the said Morrison has not paid said defendant the aforesaid sum of money, or any part thereof; nor have the executors or administrators of said Morrison, since his death, or any one for him or them, paid said defendant said sum of money, or any part thereof, but the same remains wholly unpaid; which said sum of money, or so much thereof as is equal to the demand of said plaintiffs, the said defendant offers to set off and pleads as a set off against said plaintiffs' demand, &c.

4. Because the cause of action and demand set forth by the plaintiffs did not accrue within five years next before the impetration of the original writ in the cause.

To these several pleas the plaintiffs demurred, for insufficiency; and the demurrer being overruled, the United States replied, "the matters and things contained in the third plea of the defendant are not good and sufficient in law to bar and

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preclude the United States from having and maintaining their action; and they further say that the matters and things contained in the fifth plea of the defendant of the statute of limitations are not good and sufficient in law to bar and preclude the plaintiffs from having their action, &c.

The court sustained the demurrer, and ordered that the third and fifth plea be overruled, and gave time to the defendant to put in other pleas.

And afterwards, at October term 1824 of the Court, the defendant pleaded *actio non*, because the account upon which the plaintiffs' suit is founded, was for money alleged to have been advanced by James Morrison to the defendant on the 21st day of December, 1812, in the district aforesaid, amounting to the sum of \$10,000, for which, by the terms of the transaction and the express agreement of said parties thereto, said Buford was to account to said Morrison for the same, and that said account and claim of said Morrison was, on the 7th day of March 1823, under and by virtue of an act of congress, assigned and transferred by said Morrison to said plaintiffs; and the said defendant in fact says, that said demand and cause of action aforesaid, did not accrue to said Morrison within five years next before said assignment aforesaid, &c.

7. That on the 21st day of December 1812, this defendant received from a certain James Morrison, the sum of ten thousand dollars, and executed to him a receipt therefor, that is to say, in the commonwealth and district of Kentucky; and on the 7th day of March 1823, the said Morrison assigned by his certain writing, to which is subscribed his proper hand, all his right and claim to the money in the said receipt specified as aforesaid, and upon that receipt and assignment aforesaid, and without any other consideration, and without the consent and privity of the defendant, the account in the declaration mentioned was settled, examined and adjusted at the treasury department of the United States, to which settlement and adjustment this defendant has at no time assented; And the defendant says that he did not undertake and assume to pay the said debt in the declaration

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mentioned within five years next before the assignment by the said Morrison, nor then, nor at any time subsequent.

8. Because he says that the assumpsit and demand of said plaintiff arose upon and by virtue of a claim which was held by virtue of one James Morrison for money by him advanced and loaned to said defendant on the 21st day of December 1812; and which claim and demand of said Morrison was, by virtue of an act of congress on the 7th day of March 1828, assigned and transferred to said plaintiffs. And the defendant in fact says, that the said cause of action did not accrue or arise within five years next before the suing out of the original writ in this cause, &c.

9. And because the claim and demand of said plaintiffs was derived by assignment and transfer from James Morrison, of a certain writing executed by the defendant to said Morrison, acknowledging the receipt of ten thousand dollars, by the defendant from Morrison, stipulating to account therefor to said Morrison under and by virtue of an act of congress, which assignment as aforesaid was made on the 7th day of March 1823, and for no other consideration whatever. And the defendant in fact says, that said Morrison, before and at the date of said assignment in the district aforesaid, was indebted to said defendant in a sum equal to the sum demanded by said plaintiff, to wit, the sum of eleven thousand dollars, for money by said defendant before that time loaned and advanced to the said Morrison, for money had and received by said Morrison to the use of said defendant, and for money by said defendant paid, laid out and expended for said Morrison, and all at the special instance and request of said Morrison, and being so indebted, he, said Morrison, in consideration thereof, then and there assumed upon himself, and promised said defendant to pay said sums of money, whenever he should be thereto afterwards requested, and although often requested has not paid the same, which said sum of money, said defendant is here willing, and offers to set off against the plaintiffs' demand.

To the ninth plea the attorney of the United States filed a replication stating, that the United States ought not to be barred by any thing therein contained, because he says that

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the said James Morrison was not, at the date of said assignment in said plea mentioned, indebted to the said defendant, as in pleading the defendant hath alleged. Upon this replication issue was joined.

To the sixth, seventh, and eighth pleas, the plaintiffs replied that the United States ought not to be barred by any thing contained in the said pleas, because the demand in the declaration accrued for and in consideration of ten thousand dollars of and belonging to the United States, and by the said James Morrison, as an officer of the United States, advanced to the said Thomas Buford as an officer of the United States, to wit, as deputy commissary of the United States, then and there, and to the use of the said United States, and by the said Thomas Buford, in his official character as deputy commissary as aforesaid, receipted for to James Morrison, in his official character as deputy quarter master general. And the said attorney for the United States brings here into court, the said receipt signed with the proper name of said Thomas, and in his official character as aforesaid, and assignment, and the act of the congress of the United States in the sixth, seventh, and eighth pleas of the defendants mentioned, duly certified according to the acts of the congress of the United States in such case made and provided, which said sum of money of and belonging to the United States so as aforesaid advanced by the said deputy quarter master general, to the said deputy commissary of the United States, and so as aforesaid receipted for, by said Thomas Buford as deputy commissary as aforesaid, is the same money, and receipt, and assignment, in the said sixth, seventh, and eighth pleas of the defendant mentioned, and this the said attorney of the United States is ready to verify: wherefore, &c.

The defendant after craving oyer of the writing in the replication to the sixth, seventh, and eighth pleas, rejoined, that by reason of any thing by the plaintiffs alleged in replying to the sixth, seventh, and eighth pleas of the defendant, the plaintiffs ought not to have and maintain their action against the defendant, because he says that the money received by him from the said Morrison was received upon an

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individual transaction between the said Morrison and the defendant, and the express understanding and agreement that the defendant was to account therefor with the said Morrison, and not upon any contract for this defendant to account with the plaintiffs, and of this he puts himself upon the country.

The plaintiffs surrejoined and stated, that the money demanded by the declaration, and expressed in the receipt and assignment in the sixth, seventh, and eighth pleas of the defendants, was the proper money of the United States, lent and advanced by said quarter master general to the said Thomas Buford, as deputy commissary, and to the use of the said United States, as in the replication to the said pleas, six, seven, and eight, is alleged.

The defendant demurred, and the United States having joined in the demurrer, the court gave judgment "that the law was with the defendant."

Afterwards, at a subsequent day of this same term "the attorney for the United States moved to withdraw the replication to the pleas of the statute of limitation, for the purpose of replying thereto a written agreement produced in court by the attorney, under the hand and seal of James Morrison and the said Buford, respecting the statute of limitations."

The writing referred to was as follows:

"Whereas there is an item of ten thousand dollars in the account of James Morrison, late deputy quarter master general, charged by him as paid to Thomas Buford, deputy commissary general United States army, or of purchases, in December 1812, suspended on the allegation, by the proper officer of the war department for the United States, that Morrison should look to Buford for this money, and Morrison having been advised that it would be proper that he should institute a suit against Buford, so as to preclude any question about the statute of limitations; but being willing to await a reasonable time to let Buford show, if he can, that said sum was paid, or properly accounted for by him; now Morrison agrees that he will not bring suit before 1st day of June 1819; and Buford agrees that if suit is brought thereafter, the statute of limitation should be no bar to Mor-

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rison & recovery, if he is otherwise entitled to recover. In testimony whereof, we have hereunto set our hands and seals, this 20th day of December 1819."

This motion was overruled by the court.

The record contained the following memorandum. "After the demurrer decided in this cause, the attorney for the United States produced the writing between James Morrison and said Buford respecting the statute of limitations, in the words and figures following, (inserted), and moved for leave to withdraw the demurrer to the pleas of the statute of limitations, for the purpose of replying to the said writing, and for cause shown, that he had come to the possession and knowledge of said writing since the decision of the court upon the demurrer. The court overruled the motion upon the ground that the writing would not be an avoidance of the statute, but only a substantive cause of action for breach of said covenant, expressing, however, that leave should be given if the writing would be a sufficient reply and evidence of the statute of limitations, to which opinion of the court in refusing to withdraw the demurrer, and to reply, the attorney for the United States excepted, and brought this writ of error."

The case was argued by Mr Berrien, attorney general of the United States, for the plaintiffs in error; and by Mr Wickliffe and Mr Ogden for the defendant.

The attorney general contended, that the court in pronouncing its judgment was bound to look at the whole record, and give judgment accordingly. 1 Stephens on Pleading, 162. The original error was in allowing the plea of the statute of limitations, which could only be sustained on the ground that the United States had no original cause of action against Thomas Buford, and that the limitation had attached before this action was brought.

1. The United States had an original and good cause of action.
2. That if the assignment is to be referred to, still the right of action is in the United States.

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3. The treasury settlement was conclusive against the defendant, and whether the right of action existed originally or derivatively, the statute was no bar to the suit by the United States.

As to the first point: the declaration alleges, and the replication and surrejoinder reiterate the allegation, that "this was the proper money of the United States, received by the defendant to the use of the United States," and the demurrer on the part of the defendant admitted the same. If the money of the United States is advanced by one agent of the government to another, this is *prima facie*, by necessary implication, an advance to the use of the government. In the case before the court, by the terms of the receipt given by the defendant, this is shown; as the receipt acknowledges the money to have been paid by James Morrison, "deputy quarter master general of the United States," to Thomas Buford, "deputy commissary general;" and promises to account for the same. To whom was he to account, but to "the deputy quarter master general," the agent of the United States. The money was received by the defendant as an officer of the United States, from Morrison as an officer; and was therefore received to the use of the United States.

Under the provisions of the act of congress of 20th March 1812, it was the duty of the commissary general to account to the quarter master general, and thus the obligations of duty, and those assumed by the receipt, were the same. The transaction was official in its character, and was therefore one in which the rights of the United States were in full operation. Had Buford, in his accounts as an officer, in the settlement of those accounts with the United States, given credit for this sum, he would have been discharged from all liability to Morrison for the amount.

If the claim of the United States is to rest on the receipt given to Morrison, and the assignment made of it under the act of congress, it was contended that the law which authorised the transfer gave to the receipt an assignable character, and authorised the United States to sue upon it in this form.

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The treasury settlement was evidence against the defendant, as he was within the objects of the provisions of the act. *Walton vs. The United States*, 9 Wheaton, 651. In every case of "delinquency" in an officer, or any one accountable to the United States, the settlement is evidence; and the privity or consent of the debtor is not required to give it validity.

The statute of limitations of Kentucky is not a bar to the suit of the United States. *The United States vs. Hoar*, 2 Mass. Rep. 311.

If the claim of the United States was under the assignment only, as the receipt is a promise "to account when called upon;" until called upon there was no cause of action, and the promise was not broken until the defendant was called on.

The court should have admitted the replication to be withdrawn; and the agreement between Buford and Morrison was a good answer to the plea of the statute of limitations.

Although the rule is admitted that error does not lie for matters in the discretion of a court, yet exceptions to this rule exist, and this is a case for an exception. *Mandeville vs. Wilson*, 5 Cranch, 15. The plaintiffs had no knowledge of the agreement which they desired to give in evidence until after the demurrer to the defendant's pleas; and he desired to make this a distinct matter, in reply to the allegation that the claim was barred by the statute of limitations. Cited, *Young vs. The Commonwealth*, 6 Binney's Reports, 88. *Marine Insurance Company vs. Hodgson*, 6 Cranch's Rep. 206.

The court having stated the reasons for the refusal of the motion of the plaintiff, they may therefore be examined; and when examined they will be found to be erroneous, and may be assigned as error. It was error to refuse the motion, because the plaintiffs were thus excluded from the benefit, and legal operation of the evidence; and having the construction of the evidence presented for the decision of this court, if it should have been necessary. Upon a

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fair examination of the stage of the pleadings, the plaintiffs' claim should have been allowed.

The agreement was a good bar to the statute. Its object was to prevent the operation of the statute. By it Morrison agreed not to bring suit before a day named, and Buford agreed that if suit should be brought thereafter, the statute should not be a bar.

In England the courts proceed on the principle that the bar created by the statute rests "on the presumption of payment," and whatever repels the presumption takes the case out of its operation. 2 Stark on Ev. 892. The agreement between Morrison and Buford does this effectually. It admits the debt to have existed; it provides that time shall be allowed to show payment, and it implies a promise of payment on the condition of forbearance.

Mr Wickliffe and Mr Ogden, for the defendant, argued, that the liability of the defendant upon the receipt, was a private, and not a public responsibility: although the official description of the parties was used, it did not therefore become an act of an official character. The deputy quarter master general had no right to advance or pay the money of the United States to the deputy commissary. The officers were in different spheres, each accountable to their government, and not to each other. This is declared by the provisions of the fifth section of the act of congress of 1812.

Such were the views of the accounting officers of the treasury upon this subject, and therefore they considered the advance made by Morrison to Buford illegal. A special act of congress was necessary to authorise the credit, and to make the charge against Buford legal in the treasury department. It was legal from the date of that act, and not before. This was therefore a transaction between two officers of the government, unconnected in their official duties, and the United States did not necessarily derive from the same a right of action against the receiver of the money.

The provisions of the acts of congress authorising treasury settlements and making them evidence, did not apply to such a case. These laws comprehended cases of disbursing officers liable to account to the United States; and the certifi-

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cate of the treasury department could be controverted by the defendant, and he had a right to do so by the usual practice and forms of pleading.

The sixth, seventh, and eighth pleas are good, if the defendant was not indebted to the United States. It is admitted that the statute of limitations does not run against the United States, but as between Morrison and Buford it did run; and when the assignment of the claim on the receipt were made, the statute had attached, and the United States were in no better situation than was that of Morrison before and at the time of the assignment. The suit should have been instituted by the plaintiffs as assignees, and it would have been in that form subject to the rights of the defendant growing out of the statute of limitations, and to all the offsets to which the defendant was entitled, in his particular and private relations with Morrison.

The United States, if they claimed on the receipt and assignment, and desired to show that the statute did not run, should have stated the same in their replication, by alleging a demand within five years.

The case comes up without any opinion of the court upon the point of law. There is a question of law which arises in the pleadings, they having ended in a demurrer; and the pleadings, it is submitted, present the only question in the cause. The receipt is not in question. It may show a responsibility to the United States by the defendant; but as it is not in the pleadings, it cannot aid the plaintiffs' case.

The question for the decision of this court, is not whether the declaration is good, but whether the pleas are good. If they are, the defendant must go without day.

The declaration, whether it must be considered as general or special, is a statement of a debt due to Morrison, and assigned to the United States, and the pleas allege that if the debt existed, it is barred by the statute of limitations, and there is no claim. This is not met by the United States. They do not traverse this, and thus put it in issue; nor do they traverse the defendant's allegation which is made, that the transaction with Morrison was private. The replication is therefore defective.

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It is not seen how this court can look any further into the pleadings on a demurrer, and it must be conceded that the error is in the replication. The matters asserted in the pleas stand uncontradicted; and must be taken as true against the plaintiff. This is decisive of the cause. If Busford was, by the terms of the receipt, liable on demand, a demand should have been alleged.

The refusal of the court after judgment in favour of the defendant, to allow the plaintiffs to withdraw the replication, in order to set up the agreement, was in the exercise of their discretion, and not examinable in this court. To admit as ground of error the refusal of motions of this kind, would be productive of frequent injustice. The record never shows why acts of the character of that complained of are done, and thus a superior court would often be found proceeding upon very different circumstances from those which existed in the case.

It is doubtful whether it is within the province of a court to interfere with such a decision as that now objected to. It is not a final judgment; and the final judgment upon the pleadings in the case is yet subsisting and must remain until reversed. The motion was to set aside the judgment, and this is not a ground of error. The rule is invariable, that there should be something in the record upon which the court can exercise their judgment.

The principles recognised in this court in *Bell vs. Morrison*, 1 Peters, 351, in reference to the statute of limitations, establish the rule to be, that an acknowledgement of the debt will not take the case out of the statute. There must be a promise to pay the debt. The courts of Kentucky have held these principles to be correct, and they support the decision of the circuit court upon the agreement between the defendant and Morrison.

Mr Justice M'LEAN delivered the opinion of the Court:

This suit was brought by writ of error from the circuit court of Kentucky, to reverse a judgment obtained in that court against a claim prosecuted by the United States. The following errors are assigned by the attorney general:

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1. That the judgment of the circuit court on the defendant's demurrer to the surrejoinder of the plaintiffs, growing out of the sixth, seventh and eighth pleas of the defendant, ought to have been for the plaintiffs and not for the defendant.

2. That the court erred in not permitting the plaintiffs to withdraw their replication to the defendant's several pleas of limitation, and to plead the special agreement on that subject between Morrison and Buford.

The declaration contains but one count, in which it is alleged, that the defendant was indebted to the United States in the sum of ten thousand dollars, for so much money by him before that time had and received, as an officer of the United States to their use, as by account of the said defendant with the said United States, settled, examined and adjusted, at the treasury department, duly certified, fully appears, &c.

The treasury statement is as follows :

Dr Thomas Buford, late deputy commissary in account with the United States,

To James Morrison, for amount received from him per receipt, 21st December 1812, for which he is accountable, - . - . - \$10,000

The receipt referred to is in the following words :

Received of James Morrison, deputy quarter master general, ten thousand dollars, for which sum I promise to account to him when called on. Signed Thomas Buford, deputy commissary of U. S. A.

Under the following act of congress, this receipt was assigned to the United States.

"Be it enacted by the senate and house of representatives, in congress assembled, that the accounting officers of the treasury department be and they are hereby authorised to allow James Morrison, late deputy quarter master general, in the settlement of his accounts, the sum of ten thousand dollars, which was advanced by James H. Pendell, an assistant deputy quarter master general, providing that the said James Morrison shall first assign and transfer to the United States all his right and claim to the moneys men-

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tioned in a certain receipt by said Thomas Buford to said James Morrison, bearing date the 21st day of December, in the year 1812, &c." The words of the assignment are, "Now, I James Morrison, in pursuance of the provisions of said law, do hereby assign and transfer to the United States, all my right and claim to the moneys mentioned in said receipt. Witness my hand and seal this 7th day of March 1823. Signed James Morrison.

In the sixth plea the defendant says, the plaintiff's action, because he says that the account upon which the plaintiff's suit is founded, was for money alleged to have been advanced by James Morrison, to the defendant, on the 21st day of December 1812, in the district aforesaid, amounting to the sum of ten thousand dollars, for which, by the terms of the transaction and agreement of said parties thereto, said Buford was to account to said Morrison for the same, and that said account and claim of said Morrison was, on the 7th day of March 1823, under and by virtue of an act of congress, assigned and transferred by said Morrison to said plaintiff, and the said defendant in fact says, that said demand and cause of action aforesaid, did not accrue to said Morrison within five years next before said assignment, and this he is ready to verify," &c.

The seventh plea states the receipt of the money by the defendant from Morrison, the assignment of the receipt; and that without any other consideration, and without the consent and privity of the defendant, the account in the declaration mentioned, was settled at the treasury; to which he has at no time assented; and the defendant says that he did not undertake and assume to pay the said debt, in the declaration mentioned, within five years next before the assignment by the said Morrison, nor then, nor at any time subsequent.

In the eighth plea the defendant says, that the assumpsit and demand of said plaintiff arose from and by virtue of a claim which was held by one James Morrison, for money by him advanced and loaned to said defendant, which was assigned, &c.

The attorney for the United States, in his replication, says, that by any thing contained in the sixth, seventh and eighth

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pleas of the defendant, they ought not to be barred, because they say that the said demand in the declaration accrued for and in consideration of ten thousand dollars of and belonging to the United States, and by the said James Morrison, as an officer of the United States, advanced to the said Thomas Buford, as an officer of the United States, to wit, as deputy commissary, then and there to the use of the United States, and by the said Thomas Buford, in his official character as aforesaid, received to said James Morrison in his official character as deputy quarter master general, and the said attorney brings here into court the said receipt, signed with the proper name of the said Thomas, in his official character as aforesaid, the assignment, and the act of congress, in the sixth, seventh and eighth pleas of the defendant mentioned, duly certified, &c. which sum of money is the same as referred to in the above pleas, &c.

To this replication there is a rejoinder by the defendant, asserting that the above sum of money was received upon an individual transaction, &c. The attorney for the United States in his surrejoinder says, that the said money demanded by the declaration and expressed in said receipt and assignment in the sixth, seventh and eighth pleas of the defendant, was the proper money of the United States, lent and advanced by the said quarter master general to the said Thomas Buford, as deputy commissary, and to the use of the said United States, &c.

To this the defendant demurs, which presents for consideration, the sufficiency of the sixth, seventh and eighth pleas of the defendant.

In behalf of the government it is contended,

1. That a good cause of action by the United States against Buford, existed, prior to the assignment.

2. That the treasury settlement gave a right of action, and also the assignment.

3. If the sum received by Buford from Morrison was public money, whether it was received in an official or private capacity, there can be no doubt that Buford received it to the use of the United States, and that they may maintain an action against him.

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The United States had a right to treat Morrison as their agent, in this transaction, by making Buford their debtor, and to an action brought against him, for money had and received, the statute of limitations would be no bar. It is therefore important to consider on what ground the plaintiffs seek to recover in this case.

Is the declaration general or special? It contains only one count, and that sets out the cause of action as arising from a settled account at the treasury department. The declaration must therefore be considered as special, and if the plaintiffs recover, they must recover upon the ground stated.

The treasury statement, the receipt and the assignment of it, are made a part of the declaration.

An account stated at the treasury department, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books. In these cases the officers may well certify, for they must have official knowledge of the facts stated.

But where moneys come into the hands of an individual, as in the case under consideration, the books of the treasury do not exhibit the facts, nor can they be officially known to the officers of the department. In this case, therefore, the claim must be established, not by the treasury statement, but by the evidence on which that statement was made.

The account against Buford is founded on the receipt, and was made out on the day it was assigned by Morrison, under the special act of congress. Until this time, Morrison was charged on the books of the treasury with this sum of ten thousand dollars, and there can be no doubt that he and his sureties were liable for it.

As the advance of this sum to Buford was not made in pursuance of any authority, the treasury officers had no right to release Morrison from liability, by crediting his account with so much money paid to Buford.

The declaration being special upon the treasury account,

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and the account being raised upon the assignment of the receipt, the claim of the United States to the sum in controversy, as presented, cannot be considered as existing prior to the assignment.

It is objected that, under this assignment, the United States may claim as assignees in equity, but not at law. This objection seems not to be well founded. In England, any instrument or claim, though not negotiable, may be assigned to the king, who can sue on it, in his own name. No valid objection is perceived against giving the same effect to an assignment to the government in this country. But the special act under which this assignment was made, puts this question at rest. This act authorises the assignment; consequently, when made, the legal right is vested in the government, and authorises a charge against Busford, on the books of the treasury.

As more than five years had elapsed from the date of the receipt to the assignment, the statute of limitations will bar a recovery of this claim, unless the transfer of it to the United States has changed its character, or the terms of the receipt prevent the statute from operating, or, by some promise or agreement between Morrison and Busford, the statute has been waived.

It can require no argument to show, that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor. If the character of the claim be so changed, as to exempt it from the operations of the statute of limitations, after the transfer, such transfer cannot have the effect to take the claim out of the statute when it has run.

But it is contended, that as the receipt promises to account for the sum of ten thousand dollars, when called on, it was necessary for the defendant to show, that no demand had been made, or that five years had elapsed subsequent thereto and before the assignment.

In his plea the defendant states, that the demand and cause of action did not accrue within five years next before said assignment, &c. If a demand had been made so as to prevent the effect of the statute, it was incumbent

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on the plaintiffs to plead over and allege the fact. They have not done it, and this allegation of the plea stands uncontradicted, and is consequently admitted to be true.

The defendant in his plea sets out, that the loan of the money was obtained from Morrison, to whom the payment was to be made, and represents the transaction as a private one. In the replication, the plaintiffs do not traverse this fact, but allege that the money belonged to the United States, and was advanced by Morrison, as an officer of the United States, to the defendant, as an officer.

On the sufficiency of the plea, and the insufficiency of the replication, one of the counsel in the defence rests the cause.

In the correct order of pleading, it is necessary that the facts of the plea should be traversed by the replication, unless matter in avoidance be set up. It is not sufficient that the facts alleged in the replication be inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea.

In the case under consideration, it was material in the defence, to show that the loan of this money was a private transaction, and such is the statement of the plea, substantially. This fact should have been traversed in the replication. It was not done, and consequently the replication is bad on demurrer.

The writing set out in the bill of exceptions, it is insisted, shows a waiver of the statute by Buford. This writing was produced after the decision of the court was given on the demurrer, and leave was then asked to withdraw the replication to the plea of the statute of limitations, for the purpose of pleading this covenant, of which, it was alleged that the attorney for the United States had no knowledge, until after the decision on the demurrer. The court overruled the motion, upon the ground that the writing would not be an avoidance of the statute, but afford only a substantive cause of action for a breach of its conditions.

The court, it is contended, in refusing leave to amend, decided the effect of this covenant, and that they erred in their construction of it.

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This court has repeatedly decided, that the exercise of the discretion of the court below, in refusing or granting amendments of pleadings or motions for new trials, affords no ground for a writ of error. In overruling the motion for leave to withdraw the replication and file a new one, the court exercised its discretion, and the reason assigned, as influencing that discretion, cannot affect the decision.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel; on consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed.

ALEXANDER GORDON AND OTHERS vs. FRANCIS B. OGDEN.

The plaintiff below claimed more than two thousand dollars in his declaration, but obtained a judgment for a less sum.

The jurisdiction of this court depends on the sum or value in dispute between the parties, as the case stands upon the writ of error in this court; not on that which was in dispute in the circuit court. [84]

If the writ of error be brought by the plaintiff below, then the sum which the declaration shows to be due may be still recovered, should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is still in dispute. [84]

But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the circuit court, and consequently the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties. [84]

WRIT of error to the circuit court for the district of Louisiana.

Mr Ogden moved to dismiss the writ of error in this case, on the ground that the court had not jurisdiction of the cause, the sum in controversy not amounting to two thousand dollars, the amount for which a writ of error is allowed. He stated, that the action was instituted for the violation of a patent, and the amount of the recovery in damages was four hundred dollars, by the verdict of the jury. If, under the provision of the patent law, the damages are to be trebled, it will not amount to a sum authorising the writ of error.

Although the damages laid in the declaration are two thousand six hundred dollars, yet, after verdict, as the writ of error is taken by the defendant below, the only matter in dispute here is the amount of the verdict, or at most, treble that sum, being twelve hundred dollars. If the sum stated in the declaration shall be allowed to ascertain the amount in dispute, in every case of tort or of claims of uncertain damages, the plaintiff, who might insert any sum in his declaration, could secure the right to a writ of error to this court.

Mr Cox, for the plaintiff in error, the defendant below, on the authority of Wilson *vs.* Daniel, 3 Dall. Rep. 401,
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[*Gordon and others vs. Ogden.*]

1 Condensed Reports, 185, contended, that the matter in dispute originally, determined the jurisdiction ; and in this case the sum stated in the declaration ascertains the amount. He also cited *Payton vs. Robertson*, 9 Wheaton, 527. *Cooke vs. Woodrow*, 5 Cranch, 14.

Mr C. J. MARSHALL delivered the opinion of the Court.

A motion has been made to dismiss his writ of error because the court has no jurisdiction over it. The plaintiff below claimed more than two thousand dollars in his declaration, but obtained a judgment for a less sum. The defendant below has sued out a writ of error, and contends now that the matter in dispute is not determined by the judgment, but by the sum claimed in the declaration.

This court has jurisdiction over final judgments and decrees of the circuit court, where the matter in dispute exceeds the sum or value of two thousand dollars. The jurisdiction of the court has been supposed to depend on the sum or value of the matter in dispute in this court, not on that which was in dispute in the circuit court. If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may be still recovered, should the judgment for a smaller sum be reversed ; and consequently the whole sum claimed is still in dispute. But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the circuit court, and consequently the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties. The counsel for the plaintiff in error relies on the case of *Wilson vs. Daniel*, 3 Dall. 401. That case, it is admitted, is in point. It turns on the principle that the jurisdiction of this court depends on the sum which was in dispute before the judgment was rendered in the circuit court. Although that case was decided by a divided court, and although we think, that upon the true construction of the twenty-second section of the judicial act, the jurisdiction of the court depends upon the sum in dispute between the parties as the case stands upon the writ of error, we should be much inclined to adhere to the decision in *Wilson vs. Daniel*, had not a contrary practice since prevailed. In *Cooke vs. Wood-*

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row, 5 Cranch, 13, this court said, "if the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute." This however was said in a case in which the defendant below was plaintiff in error, and in which the judgment was a sufficient sum to give jurisdiction.

The case of Wise and Lynn *vs.* The Columbian Turnpike Company, 7 Cranch, 276, was dismissed because the sum for which judgment was rendered in the circuit court was not sufficient to give jurisdiction, although the claim before the commissioners of the road, which was the cause of action and the matter in dispute in the circuit court, was sufficient. The reporter adds, that all the judges were present.

Since this decision we do not recollect that the question has been ever made. The silent practice of the court has conformed to it. The reason of the limitation is that the expense of litigation in this court ought not to be incurred, unless the matter in dispute exceeds two thousand dollars. This reason applies only to the matter in dispute between the parties in this court.

We are all of opinion that the writ of error be dismissed, the court having no jurisdiction of the cause.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of East Louisiana, and was argued by counsel; on consideration whereof, and of the motion made by Mr Ogden in this cause on a prior day of this term, to wit, on Thursday, the 28th of January of the present term of this court, to dismiss this writ of error for want of jurisdiction, the amount in controversy not exceeding the sum of two thousand dollars; it is ordered and adjudged by this court that the writ of error in this cause be and the same is hereby dismissed for want of jurisdiction, on the ground that the sum in controversy does not exceed the sum of two thousand dollars, and the same is dismissed accordingly.

ANNA MARIA THORNTON, EXECUTRIX OF WILLIAM THORNTON,
PLAINTIFF IN ERROR vs. THE BANK OF WASHINGTON.

The party who demurs to evidence, seeks thereby to withdraw the consideration of the facts from the jury; and is therefore bound to admit not only the truth of the evidence, but every fact which that evidence may legally conduce to prove in favour of the other party. And if upon any view of the facts, the jury might have given a verdict against the party demurring, the court is also at liberty to give judgment against him. [40]

The taking of interest in advance upon the discount of a note in the usual course of business by a banker, is not usury. This has been long settled, and is not now open for controversy. [40]

The taking of interest for *sixty-four days* on a note is not usury, if the note given for sixty days, according to the custom and usage in the banks at Washington, was not due and payable until the sixty-fourth day. In the case of Renner *vs.* The Bank of Columbia, 9 Wheat. 581, it was expressly held, that under that custom the note was not due and payable before the sixty-fourth day, for until that time the maker could not be in default. [40]

Where it was the practice of the party who had a sixty day note discounted at the bank of Washington, to renew the note by the discount of another note on the sixty-third day, the maker not being in fact bound to pay the note according to the custom prevailing in the district of Columbia; such a transaction on the part of the banker is not usurious, although on each note the discount for sixty-four days was deducted. Each note is considered as a distinct and substantive transaction. If no more than legal interest is taken upon the time the new note has to run, the actual application of the proceeds of the new note to the payment of the former note before it comes due, does not of itself make the transaction usurious. Something more must occur. There must be a contract between the bank and the party at the time of such discount, that the party shall not have the use and benefit of the proceeds until the former note becomes due, or that the bank shall have the use and benefit of them in the mean time.

ERROR to the circuit court of the county at Washington in the district of Columbia.

This case was brought before the court to reverse the judgment of the circuit court on a demurrer to the evidence offered by the defendants in error, the plaintiffs below, to sustain a claim on Mr Thornton as indorser on a promissory note discounted at the bank of Washington, for the benefit of one Bailey, the maker of the note.

The facts of the case are stated in the opinion of the court, delivered by Mr Justice STORY.

[*Thornton vs. The Bank of Washington.*]

Mr C. C. Lee and Mr Jones, for the plaintiffs in error, contended that the evidence offered by the plaintiffs below proved that usury had been taken on the note, and by the statute of usury in Maryland the note was declared void. If usury had been taken, the judgment of the circuit court must therefore be reversed.

The loan was made on a note payable in sixty days, which with the days of grace made it a loan for sixty-three days, and the bank had received the interest in advance by way of discount for sixty-four days.

The legislation of all mankind has been against usury; and the legislation of Maryland has been desirous and vigilant to suppress it. The principle in all courts acting under these laws has been, that if usury was found to have been taken, the wit of man would not evade the statute.

The transactions between the bank and the drawer of the note are admitted. It was a loan of money, and six renewals of the note took place in the year, and therefore the interest for six days was illegally taken. The series of loans are to be considered as one transaction. The notes were given for the accommodation of the drawer; and their renewals were expected, and were considered by the borrower and the bank as a part of the contract. The succeeding note was only substituted for that which had preceded it, in order to enable the bank to charge and receive the interest, by way of discount, every sixty-three days. Every security was therefore tainted with the usury of the whole dealing. This position is fully maintained by the case of *Cuthbert vs. Hayley*, 8 T. R. 390. The law of Maryland relative to usury and that of England is the same, as was seen by this court in the case of *Gaither vs. The bank of Georgetown*, 1 Peters, 37. Cited also, Marshall, 349. 5 Taunt. 780. 7 Com. Dig. Usury, 627. 3 T. R. 530.

The taking of interest by way of discount was a device which was originally, and long continued to be, considered a violation of the statute. *Barns vs. Worledge*, Cro. James, 25. *Comyn on Usury*, 82. *Noy*, 171. 1 Bulstrode, 20. These cases are confirmed in *Marsh vs. Martindale*, 3 Bos.

[*Thornton vs. The Bank of Washington.*]

& Pul. 154, and fully establish the principle that receiving interest beforehand is usury. *Comyn on Usury*, 90.

It is admitted that the practice of bankers to take "discount" is now allowed; but this is upon principles which do not authorise the practice which prevails with the defendants in error. As late as 14 George II. 7 Mod. 353, it was held by Mr Chief Justice Wills, that "otherwise the force of the statute would be taken away." The practice is since however considered legal for bankers to take interest in advance as discount. The allowance of this practice, upon the principles by which it is protected, is not evidence that the general principles of the law are altered. The expenses of postage, remittance, and commission, are considered as paid by this advance. *Auriol vs. Thomas*, 2 T. R. 52. 1 Bos. & Pul. 144: *Comyn on Usury*, 128.

That the principles of the law as originally established are not altered, cited Peake's *Nisi Prius Cases*, 200. *Comyn*, 125. 4 *Taunt*. 810. *Brooke, qui tam vs. Middleton*, 1 *Camp*. 445. *Comyn*, 132.

Banks are allowed to deduct interest, and, *ex vi termini*, discount. *Fleckner vs. The bank of the United States*, 8 *Wheat*. 354. But this does not allow the deduction of a greater amount than the interest for the actual advance. The bill of exceptions presents the custom of the bank as a justification of the proceeding. Custom is no protection. *Floyer vs. Edwards*, 1 *Cowp*. 112. *Dunham vs. Gould*, 16 *Johns*. 367.

It was argued that the practice of the bank to give notice of the dishonour of the bill on the fourth day after the sixty days, does not relieve the case from difficulty; as this could only be done by proof that there was a forbearance until the *fourth* day, the very reverse of which is established by the evidence; nor will the practice of the bank to protest on the fourth day, and not before, assist the claim. The universal commercial rule is, that on the third day of grace the note is due; and on non-payment before or upon that day, the money may be demanded and suit brought.

The question in this case has been decided in New York. *Bank of Utica vs. Wagner*, 2 Cowen's Rep. 712. If more than

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legal interest is reserved or taken, it is usury, whether by agreement or not. 3 Bigelow's Dig. 796. 4 Mass. 156. 15 Mass. 96.

Mr Lear and Mr Webster, for the defendant in error, contended, that the Maryland law of usury, passed in 1704, similar to the statute of Ann, had no application to the case. It was passed before the establishment of banks. The language is prohibitory as to any "person," and this may include "corporations sole," but not corporations aggregate. It is a criminal law, and a strict construction may be insisted upon. The insertion of a prohibition against taking more than six per centum in the charters of banks, is a proof that the general terms of the usury laws are not considered as extending to such corporations. It would not be necessary if this were the sound construction of the usury law.

In this case the whole question is, whether there was an agreement for forbearance for the loan of money on which more than legal interest has been taken. It is agreed that, in England, discount or interest in advance is not usurious. The facts of the case do not show that the borrower had the money for less than *sixty-four* days. On the *sixty-fourth* day, according to the custom of the bank, the note would be protested. It is admitted that a custom of trade will not take a case out of this statute, but it will go a great way to explain a transaction. 2 T. R. 52. Cowp. Rep. 114. 2 W. Black. 792. 1 Bos. & Pul. 144. 3 Bos. & Pul. 154.

Every new note was a separate transaction. At the end of each loan the loan was returned ; and whether by a new negotiation of another note, or by the repayment of the money from other means, does not connect the transactions or make them the same.

This is a demurrer to evidence, and every thing is to be taken in favour of the defendant in error, the plaintiff in error having demurred in the circuit court. It is enough for this court if a jury could have presumed from the facts that the loan was for *sixty-four* days. The bank maintains that the borrower has had or might have had the money for that time, and interest may be deducted for that time. The evidence

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authorises this conclusion. The jury might have drawn the conclusion, that no unlawful dealing was intended. The transaction was not considered as a permanent loan. The bank make no such engagement; and if the borrower of money thinks proper, for the purposes of convenience or certainty, to obtain a loan on another note, before the note already discounted is due, the bank have nothing to do with the purposes or object for which the second loan is asked. There is no necessary connection between the transactions. Both notes may run at the same time.

Mr Justice STORY, after stating the facts, delivered the opinion of the Court :

This case comes before us on a demurrer to the evidence in the court below, taken by the original defendant, now plaintiff in error; and this in our judgment is very important to be considered in the determination of the case. The party who demurs to evidence, seeks thereby to withdraw the consideration of the facts from the jury, and is therefore bound to admit not only the truth of the evidence as given, but every fact which that evidence may legally conduce to prove in favour of the other party. And if upon any view of the facts, the jury might have given a verdict against the party demurring, the court is also at liberty to give judgment against him.

The defence set up against this action by the defendant is, that the transaction is usurious, within the meaning of the statute of Maryland against usury, which, (it is admitted), is substantially like the English statute on the same subject. To sustain the defence, it has been urged that the receipts of the interest in advance for sixty-four days upon the discount of the note is usury. But we are all of opinion, that the taking of interest in advance upon the discount of notes in the usual course of business by a bank, is not usury. The doctrine has been long settled, and is not now open for controversy. The taking of the interest for sixty-four days is not usury, if the note, according to the custom and usage in the banks at Washington, was not due and payable until the sixty-fourth day. That custom was

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completely established, not only by the evidence in the present case, but by that in *Renner vs. The Bank of Columbia*, 9 Wheat. Rep. 581, which is referred to in this record. In the latter case it was expressly held by the court, that under that custom the note was not due and payable before the sixty-fourth day, for until that time the maker could not be in default.

Then, again, it is argued, that here there have been successive renewals of the note, or rather successive notes given by way of renewal of the original note, and that these renewals have been on the sixty-third day, and the money credited on that day, on account of the existing note; and thus in effect sixty-four days interest has been taken upon loans for sixty-three days only. If there had been proved any contract between the bank and the party for whose benefit the original discount was made, that the original note should be so renewed from time to time, and the extra day's interest thereupon be taken by the bank; so that the bank would have been bound to make the renewal, and the party would have been bound to renew and not to pay the note at maturity; there would have been strong grounds on which to rest the argument. But the difficulty is that no such contract is to be found in the evidence; and the party demurring to the evidence asks the court to infer it from facts which do not necessarily import it, and may well admit of an explanation favourable to the other party. It is quite consistent with every fact in the case, that the original discount may have been made without any such contract; and that the application for the renewals may have been made from time to time by the party interested for his own accommodation, and without any previous understanding or co-operation on the part of the bank. For aught that appears, he was at liberty to have paid the original note, or any one of those afterwards given, at the time when it became due. If of choice he had paid it on the sixty-third day instead of the sixty-fourth, there is no pretence to say that it would have been a case of usury. If, instead of payment, he offers a new note for discount, for the purpose of applying the proceeds to the payment or withdrawal of the former note, under

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the like circumstances, the case is not substantially varied. Each note is considered as a distinct substantive transaction. If no more than the legal interest is taken upon the time the new note has to run, the actual application of the proceeds of the new note to the payment of the former note, before it becomes due, does not of itself make the transaction usurious. Something more must occur. There must be a contract between the bank and the party at the time of such discount, that the party shall not have the use or benefit of the proceeds until the former note becomes due, or that the bank shall have the use and benefit of them in the mean time. Such a contract being illegal is not to be presumed; it must be established in evidence. The argument requires the court to infer such illegality from circumstances in their own nature equivocal, and susceptible of different interpretations; and this in favour of the party demurring to the evidence. Even if the jury might have made such an inference from the evidence, we think it ought not to be made by the court; for the rule of law requires the court in such a case to make every inference and presumption in favour of the other party, which the jury might legally deduce from the evidence; nor is this any hardship upon the party demurring to the evidence, for it is his own choice to withdraw from the jury, to whom it properly belongs, the consideration of the facts which he relies on as presumptive of usury.

Upon the other point suggested in the cause, whether banks are within the statute of usury, we entertain no doubt that they are. But, for the reasons already stated, we are of opinion that the judgment below ought to be affirmed.

THOMAS WILLISON, PLAINTIFF IN ERROR *vs.* ANDERSON WATKINS,
DEFENDANT IN ERROR.

It is an undoubted principle of law, fully recognized by this court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates with full force to prevent the tenant from violating that contract by which he claimed and held the possession. He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination, by the lapse of time or demand of possession. [47]

The same principle applies to mortgagor and mortgagee, trustee and cestui que trust, and generally to all cases where one man obtains possession of real estate belonging to another by a recognition of his title. [48]

In no instance has the principle of law which protects the relations between landlord and tenant, been carried so far as in this case, which presents a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession afterwards for such a length of time, that the act of limitations has run out four times before he has done any act to assert his right to the land. [48]

When a tenant disclaims to hold under his lease, he becomes a trespasser, and his possession is adverse, and as open to the action of his landlord as a possession acquired originally by wrong. The act is conclusive on the tenant. He cannot revoke his disclaimer and adverse claim, so as to protect himself during the unexpired time of the lease. He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right. [49]

If the tenant disclaims the tenure, claims the fee adversely in right of a third person or in his own right, or attorney to another, his possession then becomes a tortious one, by the forfeiture of his right, and the landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his claim of a day subsequent to the termination of the tenancy, for before that he had no right of entry. By bringing his ejectment he disclaims the tenancy and goes for the forfeiture. It shall not be permitted to the landlord to thus admit that there is no tenure subsisting between him and the tenant which can protect his possession from this adversary suit; and at the same time recover on the ground of there being a tenure so strong as that he cannot set up his adversary possession. [49]

A mortgagee, or direct purchaser from a tenant, or one who buys his right at a sheriff's sale, assumes his relation to the landlord, with all its legal consequences, and is as much estopped from denying the tenancy. [50]

If no length of time would protect a possession originally acquired under a lease, it would be productive of evils truly alarming, and we must be convinced beyond a doubt that the law is so settled, before we would give our sanction to such a doctrine; and this is not the case upon authorities. [51]

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The relation between tenants in common is in principle very similar to that between lessor and lessee. The possession of one is the possession of the other, while ever the tenure is acknowledged. But if one ousts the other, or denies the tenure, and receives the rents and profits to his exclusive use, his possession becomes adverse, and the act of limitations begins to run; so of a trustee, so of a mortgagee. [51]

In relation to the limitations of actions for the recovery of real property, the court think it proper to apply the remarks of the learned judge who delivered the opinion of the court in the case of Bell vs. Morrison, 1 Peters, 360, and to say, the statute ought to receive such a construction as will effectuate the beneficent objects which it intended to accomplish, the security of titles and the quieting of possessions. That which has been given to it in the present case is, we think, conformable to its true spirit and intention, without impairing any principle heretofore established. [54]

ERROR to the circuit court of the district of South Carolina.

An action of trespass to try titles was brought in the circuit court of South Carolina, on the 20th of April 1822, by the defendant in error, against the plaintiff in this court, for the recovery of six hundred acres of land situated on the Savannah river. The title claimed by the plaintiff below and the evidence are fully stated in the opinion of the court.

On the trial in the circuit court the defendant proved that Samuel Willison, his father, had possession of the land in 1789, and cultivated it till the period of his death in 1802, from which time his widow and family possessed it until the death of his widow in 1815; and that from 1815 until this action was brought, the children retained possession by their tenants. That in the lifetime of Samuel Willison, Bordeaux, through whom the plaintiff claimed, was apprised that he claimed to hold the land by an adverse title. That the widow in 1802, on demand made, refused to give possession to Ralph S. Phillips who claimed the land, and set up a title in herself, and was sued as a trespasser. That in 1793, Bordeaux and Willison were in treaty for the sale of this land; Bordeaux wishing to sell, and Willison to purchase. The plaintiff then offered in evidence a power of attorney from Bordeaux to Willison, dated February 1792, authorising him to take possession of the land, and sue trespassers; and that Willison was then a tenant of Bordeaux. The defendant having pleaded the statute of limitations (five years adverse

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possession giving a title under it) relied upon the foregoing facts. But the presiding judge overruled the plea, and instructed the jury that, when a tenancy had been proved to have once existed, the tenancy must not only be abandoned, but possession given up, before an adverse possession can be alleged. To this decision the defendant excepted.

The defendant brought this writ of error.

In the argument of the cause, the counsel for the plaintiff in error presented for the consideration of the court other exceptions besides that upon which the judgment of the circuit court was reversed. The decision of the court is exclusively upon the law arising on that which is stated.

The case was argued by Mr Blanding and Mr M'Duffie for the plaintiff in error, and by Mr Berrien, attorney general, for the defendant.

Mr Justice BALDWIN delivered the opinion of the Court.

This was an action of trespass to try titles, brought in 1822, in the circuit court of the United States for the district of South Carolina, by Watkins against Willison, for a tract of land containing six hundred acres, on the Savannah river. This land was originally granted to James Parsons, who conveyed to Ralph Phillips, whose estate was confiscated by an act of assembly of South Carolina, and vested in five commissioners appointed by the legislature of that state. The five commissioners acted in execution of the law, but before any conveyance was made of the land in question, one of them had died, and two of the others had ceased to act, or resigned in 1783. The two remaining commissioners, in 1788, conveyed this land to Daniel Bordeaux and R. Newman, who in the same year executed to the treasurer of the state, a bond and mortgage to secure the payment of the purchase money, which, pursuant to an act of assembly passed for that purpose in 1801, was transferred and delivered to Ralph S. Phillips, the son of Ralph Phillips, to be disposed of as he should think proper; and by the same law the confiscation act, so far as respected Ralph Phillips, was repealed. A suit was brought on this bond in the name of the treasurer of the state

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in 1803, against Daniel Bordeaux, and prosecuted to final judgment against his administrators in 1817, when an execution issued, on which the land was sold and conveyed by deed, from the sheriff to Anderson Watkins, the plaintiff in the circuit court, who claims by virtue of the sheriff's deed, and as standing in the relation of landlord to the defendant.

Samuel Willison, the father of the defendant, entered into possession of the premises in question in 1789, and cultivated them till his death in 1802; from which time his widow and children possessed them, till her death in 1815; since which time the children have retained possession by their tenants, till the commencement of this suit.

In 1802, Ralph S. Phillips, who was then the assignee of the bond and mortgage, made a demand of the possession from the widow, who refused to give it up, and set up a title in herself. He brought an action of trespass against her to try titles in January 1803, in which he was nonsuited in November 1805; and in March 1808 he brought another action of the same nature against her, in which no proceedings were had after 1812, which, by the law and practice of South Carolina, operates as a discontinuance of the action.

In 1792 Bordeaux, the mortgagor, executed to Willison a power of attorney authorising him to take possession of the land, and sue trespassers. Willison was then a tenant of Bordeaux.

In 1793 they were in treaty for the sale of the land; Bordeaux wanting to sell, and Willison to purchase. But during the life time of Willison, Bordeaux was apprised that he claimed to hold the land by an adverse title. The defendant exhibited no title other than what is derived from the possession of his father and the family.

The first question which arose at the trial, was on the admission in evidence of the deed from the two commissioners to Bordeaux and Newman; the defendant alleging, that no title passed by it, because it was not signed by the other two commissioners. The circuit court overruled the objection; the deed was read, and this becomes the subject of the first error assigned in this court.

As the court have been unable to procure the confis-

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cation act of South Carolina, we are unwilling to express any opinion on this exception without examining its provisions, which are very imperfectly set out in the record; and as the merits of the case can be decided on another exception, we do not think it necessary to postpone our judgment.

The remaining exception is, that the circuit court erred in charging the jury, that the claim of the plaintiff was not barred by the act of limitations of South Carolina, which protects a possession of five years from an adverse title.

It appears from the record, that the defendant and his family have been in possession of this land for thirty-three years next before this suit was brought; but whether that possession has been adverse to the title of the plaintiff during the whole of that time, or such part of it as will bring him within the protection of this law, becomes a very important inquiry.

The plaintiff contended, at the trial, that, by becoming the tenant of Bordeaux, Willison the elder and his heirs, so long as they remain in possession, are prevented from setting up any title in themselves, or denying that of Bordeaux, without first surrendering to him the possession, and then bringing their suit. That the possession of the tenant being the possession of the landlord, he could do no act by which it could become adverse; so that the statute of limitations would begin to run in his favour, or operate to bar his claim, by any lapse of time, however long.

The defendant, on the other hand, contended, that from the time of the disclaimer of the tenancy by Willison, and the setting up of a title adverse to Bordeaux and with his knowledge, his possession became adverse, and that he could avail himself of the act of limitations if no suit was brought within five years thereafter.

It is an undoubted principle of law fully recognised by this court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself, or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates in its full force to prevent the tenant from violating that contract by which he obtained and holds possession. 7 Wheat. 535.

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He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination, by the lapse of time, or demand of possession. The same principle applies to mortgagor and mortgagee, trustee and cestui que trust, and generally to all cases where one man obtains possession of real estate belonging to another, by a recognition of his title. On all these subjects the law is too well settled to require illustration or reasoning, or to admit of a doubt. But we do not think, that in any of these relations, it has been adopted to the extent contended for in this case, which presents a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession afterwards for such a length of time that the act of limitations has run out four times before he has done any act to assert his right to the land. Few stronger cases than this can occur, and if the plaintiff can recover without any other evidence of title than a tenancy existing thirty years before suit brought, it must be conceded that no length of time, no disclaimer of tenancy by the tenant, and no implied acquiescence of the landlord, can protect a possession originally acquired under such a tenure.

If there is any case which could clearly illustrate the sound policy of acts of repose and quieting titles and possessions by the limitation of actions, it is in this. Here was no secret disclaimer, no undiscovered fraud; it was known to Bordeaux, and was notice to him that Willison meant to hold from that time by his own title and on adverse possession. This terminated the tenancy as to him, and from that time Bordeaux had a right to eject him as a trespasser. Adams on Eject. 118. Bull. N.P. 96. 6 Johns. Rep. 272.

Had there been a formal lease for a term not then expired; the lessee forfeited it by this act of hostility; had it been a lease at will from year to year, he was entitled to no notice to quit before an ejection. The landlord's action would be as against a trespasser; as much so as if no relation had ever existed between them.

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Having thus a right to consider the lessee as a wrongdoer, holding adversely, we think that under the circumstances of this case the lessor was bound so to do. It would be an anomalous possession, which as to the rights of one party was adverse, and as to the other fiduciary, if after a disclaimer with the knowledge of the landlord and attornment to a third person, or setting up a title in himself, the tenant forfeits his possession and all the benefits of the lease he ought to be entitled to, such as result from his known adverse possession. No injury can be done the landlord unless by his own laches. If he sues within the period of the act of limitations he must recover : if he suffers the time to pass without suit, it is but the common case of any other party who loses his right by negligence and loss of time.

As to the assertion of his claim, the possession is as adverse and as open to his action, as one acquired originally by wrong ; and we cannot assent to the proposition that the possession shall assume such character as one party alone may choose to give it. The act is conclusive on the tenant. He cannot make his disclaimer and adverse claim, so as to protect himself during the unexpired term of the lease : he is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right.

It is on this principle alone that the plaintiff could claim to recover in this action. If there was between him and the defendant an existing tenancy at the time it was brought, he had no right of entry. The lessee cannot be a trespasser during the existence of the lease, and cannot be turned out till its termination. At the end of a definite term the lessor has his election to consider the lessee a trespasser and to enter on him by ejectment ; but if he suffers him to remain in possession, he becomes a tenant at will, or from year to year, and in either case is entitled to a notice to quit before the lessor can eject him. The notice terminates the term, and thenceforth the lessee is a wrongdoer and holds at his peril. Woodfall's Land. & Ten. 216, 220. 2 Serg. & Rawle, 49.

If the tenant disclaims the tenure, claims the fee adversely in right of a third person or his own, or attorns to another, his

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possession then becomes a tortious one, by the forfeiture of his right. The landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his demise of a day subsequent to the termination of the tenancy, for before that he had no right of entry. By bringing his ejectment, he also affirms the tenancy and goes for the forfeiture. It shall not be permitted to the landlord to thus admit that there is no tenure subsisting between him and defendant which can protect his possession from his adversary suit, and at the same time recover on the ground of there being a tenure so strong that he cannot set up his own adversary possession.

The plaintiff claims without showing any title in himself, or any right of possession, except what exists from the consequences of a tenancy, the existence of which he denies in the most solemn manner, by asserting its termination before suit brought.

The principle here asserted is not new in this court. In the case of Blight's lessee *vs.* Rochester, 7 Wheat. 535, 549, the plaintiff's lessors claimed as heirs of John Dunlap: the defendant claimed by purchase from one Hunter, who professed to have purchased from Dunlap. The defendant acknowledged the title of Dunlap as the one under which he held. Dunlap had in fact no title; but the plaintiffs insisted that the defendant could not deny his title. The Chief Justice, in giving the opinion of the court, observes: If he holds under an adversary title to Dunlap, his right to contest his title is admitted. If he claims under a sale from Dunlap, and Dunlap himself is compelled to aver that he does, then the plaintiffs themselves assert a title against this contract. Unless they show that it was conditional and that the condition is broken, they cannot, in the very act of disregarding it themselves, insist that it binds the defendant in good faith to acknowledge a title which has no real existence.

We are not aware that in applying this doctrine to the case now before the court we shall violate any settled principle of the common law.

If a different rule was established, the consequences would be very serious. A mortgagee, a direct purchaser from a

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tenant, or one who buys his right at a sheriff's sale, assumes his relations to the landlord with all their legal consequences, and they are as much estopped from denying the tenancy. If no length of time would protect a possession originally acquired under a lease, it would be productive of evils truly alarming, and we must be convinced beyond a doubt that the law is so settled before we could give our sanction to such a doctrine.

An examination of the authorities on this point relieves our minds from all such apprehensions, by finding our opinion supported to its full extent by judicial decisions entitled to the highest respect, and which we may safely adopt as evidence of the common law.

The case of *Hovenden vs. Lord Annesley* was that of a tenant who had attorned to one claiming adversely to his lessor with his knowledge. In delivering his opinion, Lord Redesdale entered into a detailed view of the decisions on the application of the act of limitations to trusts of real and personal estate in courts of law and chancery, and to fiduciary possessions generally. On the point directly before us he observes : "That the attornment will not affect the title of the lessor so long as he has a right to consider the person holding possession as his tenant. But as he has a right to punish the acts of his tenant in disavowing the tenure by proceeding to eject him, notwithstanding his lease; if he will not proceed for the forfeiture, he has no right to affect the rights of third persons on the ground that the possession was destroyed, and there must be a limitation to this as well as every other demand. The intention of the act of limitations being to quiet the possession of lands, it would be curious if a tenant for ninety-nine years, attorning to a person insisting he was entitled, and disavowing tenure to the knowledge of his former landlord, should protect the title of the original lessor for the term of ninety-nine years. That would, I think, be too strong to hold on the ground of the possession being in the lessor, after the tenure had been disavowed to the knowledge of the lessor."

The relation between tenants in common is, in principle, very similar to that between lessor and lessee : the possession

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of one is the possession of the other, while ever the tenure is acknowledged. *Cowp.* 217. But if one ousts the other, or denies the tenure, and receives the rents and profits to his exclusive use, his possession becomes adverse, and the act of limitations begins to run. *2 Scho. & Lef.* 628, &c. and cases cited. *4 Serg. & Rawle,* 570. The possession of a trustee is the possession of the *cestui que trust*, so long as the trust is acknowledged; but from the time of known disavowal it becomes adverse. So of a mortgagee, while he admits himself to be in as mortgagee, and therefore liable to redemption. *7 Johns. Cha.* 114, &c. and cases cited. But if the right of redemption is not foreclosed within twenty years, the statute may be pleaded; and so in every case of an equitable title, not being the case of a trustee, whose possession is consistent with the title of the claimant. *7 Johns. Cha.* 122.

After elaborately reviewing the English decisions on these and other analogous subjects, chancellor Kent remarks, it is easy to perceive that the doctrines here laid down are the same that govern courts of law in analogous cases, and the statute of limitations receives the same construction and application at law and in equity. *Kane vs. Bloodgood,* *7 Johns. Cha.* 90, 122. It is equally said that fraud as well as trust are not within the statute, and it is well settled that the statute does not run until the discovery of the fraud; for the title to avoid it does not arise until then; and pending the concealment of it, the statute ought not to run. But after the discovery of the fact imputed as fraud, the statute runs as in other cases; and he cites in support of this position, *1 Browne's Parliament. Cases,* 455. *3 P. Wms,* 143. *2 Scho. & Lef.* 607, 628, 636, and the cases cited.

In the case of *Hughes vs. Edwards,* *9 Wheat.* 490, 497, it was settled that the right of a mortgagor to redeem is barred after twenty years possession by the mortgagee after forfeiture, no interest having been paid in the mean time, and no circumstance appearing to account for the neglect. *7 Johns. Cha.* 122. *2 Sch. & Lef.* 636. The court in that case say, that in respect to the mortgagee, who is seeking to foreclose the equity of redemption, the general rule is, that where the mortgagor has been permitted to remain in

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possession, the mortgage will, after a length of time, be presumed to have been discharged by payment of the money or a release, unless circumstances can be shown sufficiently strong to repel the presumption; as payment of interest, a promise to pay, an acknowledgement by the mortgagor that the mortgage is still existing, or the like.

All these principles bear directly on the case now before us, they are well settled and unquestioned rules in all courts of law and equity, and necessarily lead to the same conclusion to which this court has arrived. The relations created by a lease are not more sacred than those of a trust or a mortgage. By setting up or attorneying to a title adverse to his landlord, the tenant commits a fraud as much as by the breach of any other trust. Why then should not the statute protect him, as well as any other fraudulent trustee, from the time the fraud is discovered or known to the landlord? If he suffers the tenant to retain possession twenty years after a tenancy is disavowed, and cannot account for his delay in bringing his suit; why should he be exempted from the operation of the statute more than the mortgagor or the mortgagee? We can perceive no good reasons for allowing this peculiar and exclusive privilege to a lessor; we can find no rule of law or equity which makes it a matter of duty to do it, and have no hesitation in deciding that in this case the statute of limitations is a bar to the plaintiff's action.

In doing this we do not intend to dispute the principle of any case adjudged by the supreme court of South Carolina. Of those which have been cited in the argument there are none which in our opinion controvert any of the principles here laid down, or profess to be founded on any local usage, common law, or construction of the statute of limitations of that state. One has been much pressed upon us, as establishing a doctrine which would support the position of the plaintiff, which deserves some notice. In the case in 1 Nott & M'Cord, 374, the court decide, that where a defendant enters under a plaintiff, he shall not dispute his title while he remains in possession, and that he must first give up his possession, and bring his suit to try titles. To the correctness of this principle, we yield our assent, not as one professing to be peculiar to South

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Carolina, but as a rule of the common law applicable to the cases of fiduciary possession before noticed. It is laid down as a general rule, embracing in terms tenants in common, trustees, mortgagees and lessees, but disallowing none of the exceptions or limitations which qualify it and exclude from its operation all cases where the possession has become adverse, where the party entitled to it does not enter or sue within the time of the statute of limitations, or give any good reason for his delay; leaving the rule in full force wherever the suit is brought within the time prescribed by law. To this extent, and this only, the decision would reach. To carry it further would be giving a more universal application than the courts of South Carolina would seem to have intended, and further than we should be warranted by the rules of law. To extend it to cases of vendor and vendee would be in direct contradiction to the solemn decision in 7 Wheat. 525.

In relation to the limitation of actions for the recovery of real property, we think it proper to apply the remarks of the learned judge who delivered the opinion of this court in the case of Bell vs. Morrison, 1 Peters, 351, and to say that the statute ought to receive such a construction as will effectuate the beneficent objects which it intended to accomplish,—the security of titles, and the quieting of possessions. That which has been given to it in the present case is we think favourable to its true spirit and intention, without impairing any legal principle heretofore established.

It is therefore the opinion of the court that the plaintiff in error has sustained his fourth exception, and that the judgment of the circuit court must be reversed. The cause is remanded to the circuit court with directions to award a *venire de novo*.

Mr Justice JOHNSON.

Had I felt myself at liberty in the court below, to act upon my own impressions as to the general doctrine respecting the defence which a tenant might legally set up in ejectment brought against him by his landlord, I certainly should have left it to the jury to inquire, whether the possession of Willison ever was hostile to that of Bordeaux; a fact, the evidence

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to prove which was very trifling, as appears even in this bill of exceptions. But there were produced to me official reports of adjudged cases in that state, by the courts of the last resort, which appeared fully to establish that when once a tenancy was proved, the tenant could make no defence, but must restore possession, and then alone could he avail himself of a title derived from any source whatever, inconsistent with the relation of tenant. Now it ought not to be controverted, that, as to what are the laws of real estate in the respective states, the decisions of every other state in the union, or in the universe, are worth nothing against the decisions of the state where the land lies. On such a subject we have just as much right to repeal their statutes as to overrule their decisions.

I will repeat a few extracts from one of their decisions to show, that they will at least afford an apology for the opinion expressed in the bill of exceptions upon the law of South Carolina; for I placed it expressly on their decisions, not my own ideas of the general doctrine.

The case of Wilson vs. Weatherby, 1 Nott & McCord's Rep. 373, was an action to try title, just such as the present, and heard before Cheves, Justice, in July 1815. The defendant offered to go into evidence to show a title in himself, to which it was objected, that as he had gone into possession under the plaintiff, he could not dispute his title. The objection was sustained, and a verdict given for the plaintiff. The cause was then carried up to the appellate court, and the judgment below sustained, that court unanimously agreeing the law to be as laid down by the judge who delivered the opinion, in these terms: "The evidence offered by the defendant was of a title acquired by him after he went into possession under the plaintiff, and before he gave up possession. If he was at any time the tenant of the plaintiff, he continues so all the time, unless he had given up the possession. The attempt to evade the rule of law by going out of possession a moment, and then returning into possession, did not change his situation at all; and especially as he left another person in possession, so that his possession was altogether unbroken. A distinct and bona fide abandonment of the posses-

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sion at least was necessary to have put him in a situation to dispute the plaintiff's title. On the last ground, that the defendant was not at any time the tenant of the plaintiff, the defendant was not indeed a tenant under a lease rendering rent, but he nevertheless held under the plaintiff. This ground is founded on a misconception of the principle, which is not confined to the cases of tenants in the common acceptation of the term. These cases have only furnished examples of the application of the principle, which is, that wherever a defendant has entered into possession under the plaintiff, *he shall not be permitted, while he remains in possession, to dispute the plaintiff's title.* He has a right to purchase any title he pleases, but he is bound, *bona fide, to give up possession,* and to bring his action on his title, and recover by the strength of his own title."

This is the leading case upon this doctrine in that state, and it is fully settled there, that the wife, the executor, the heir or the purchaser at sheriff's sale, is identified in interest with the previous possessor; as also that a statutory title is acquired by possession, under which one subsequently going out of possession, may recover.

Understanding such to be the law of that state, I certainly did not hold myself bound or at liberty to inquire whether it accorded with the rules of decision in any other state. In principle, I am under the impression there is not much difference, or at least not more than that court was at large to disregard if they thought proper.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of South Carolina, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo.*

THE UNITED STATES, APPELLANTS v. ISAAC T. PRESTON, ATTORNEY GENERAL OF LOUISIANA, APPELLEE.

The offence against the law of the United States, under the seventh section of the act of congress, passed the 2d of March 1807, entitled "an act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States from and after the 1st of January 1808," is not that of importing or bringing into the United States persons of colour with intent to hold or sell such persons as slaves, but that of hovering on the coast of the United States with such intent; and although it forfeits the vessel and any goods or effects found on board, it is silent as to disposing of the coloured persons found on board, any further than to impose a duty upon the officers of armed vessels who make the capture to keep them safely, to be delivered to the overseers of the poor or the governor of the state or persons appointed by the respective states to receive the same. [65]

The Josefa Segunda, having persons of colour on board of her, was, on the 11th of February 1818, found hovering on the coast of the United States, and was seized and brought into New Orleans, and the vessel and the persons on board were libelled in the district court of the United States of Louisiana, under the act of congress of the 2d of March 1807. After the decree of condemnation below, but pending the appeal to this court, the sheriff of New Orleans went on, with the consent of all the parties to the proceedings, to sell the persons of colour as slaves, and sixty-five thousand dollars, the proceeds, were deposited in the registry of the court to await the final disposal of the law.

By the tenth section of the act of 30th of April 1818, the six first sections of the act are repealed, and no provision is made by which the condition of the persons of colour found on board a vessel hovering on the coast of the United States is altered from that in which they were placed under the act of 1807, no power having been given to dispose of them otherwise than to appoint someone to receive them. The seventh section of the act of 1818 confirms no other sales previously or subsequently made under the state laws, but those for illegal importation, and does not comprise the case of a condemnation under the seventh section.

The final condemnation of the persons on board the Josefa Segunda took place in this court on the 13th of March 1820, after congress had passed the act of the 3d of March 1819, entitled "an act in addition to an act prohibiting the slave trade," by the provisions of which persons of colour brought in under any of the acts prohibiting traffic in slaves, were to be delivered to the president of the United States to be sent to Africa. It could not affect them.

In admiralty cases a decree is not final while an appeal from the same is depending in this court, and any statute which governs the case must be an existing valid statute at the time of affirming the decree below. If, therefore the persons of colour, who were on board the Josefa Segunda when captured, had been specifically before the court on the 13th of March 1820, they must have been delivered up to the president of the United States to be sent to Africa, under the provisions of the act of the 3d of March 1819, and therefore there is no

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claim to the proceeds of their sale, under the law of Louisiana, which appropriated the same. The court do not mean to intimate that the United States are entitled to the money, for they had no power to sell the persons of colour.
[65]

APPEAL from the district court for the eastern district of Louisiana.

The brig Josefa Segunda, a Spanish vessel, proceeding with a cargo of negroes from the coast of Africa to the island of Cuba, was captured on the 11th day of February 1818, off St Domingo, by a regularly commissioned Venezuelan privateer, and on the 24th of the following April she was seized in the river Mississippi by custom house officers of the United States, carried to New Orleans, and there the vessel and negroes were libelled, at the suit of the United States, in the district court of the United States for the Louisiana district.

The libel alleged that the negroes were unlawfully brought into the United States, with an intent to dispose of them as slaves, contrary to the provisions of the act of congress passed March 2d, 1807, entitled an act to prohibit the importation of slaves, &c. 2 Story's Laws U. S. 1050. The libel was filed on the 29th of April 1818, and a claim was put in by the Spanish owners, alleging an unlawful capture of the brig; that the brig put into the Belize in distress, and without any intention to infringe or violate a law of the United States. The district court condemned the brig and effects found on board to the United States, and the claimants appealed to this court.

At February term 1820 of this court, the sentence of the district court of Louisiana was affirmed; the court having been of opinion that "the alleged unlawful importation could not be excused on the plea of distress;" and that "where a capture is made by a regularly commissioned captor, he acquires a title to the captured property, which can only be divested by recapture, or by the sentence of a competent tribunal; and the captured property is subject to capture for a violation by the captors, of the revenue, or other municipal laws, of the neutral country into which the prize may be carried." 5 Wheat. 338.

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After the decree of the district court of Louisiana had been pronounced, and before the appeal to this court, the negroes found on board of the captured brig were, under the provisions of the fourth section of the act of congress, and under the act of the state of Louisiana passed the 13th of March 1818, delivered by the collector of the port of New Orleans to the sheriff of the parish of New Orleans; and they were by him sold for \$68,000, and the proceeds lodged in the bank of the United States, subject to the order of the district court.

Upon the return of the cause to the district of Louisiana from this court, Mr Roberts, an inspector of the revenue, and others, who alleged that they had made "military seizures" subsequent to that of the officers of the customs, filed claims to the moneys which were the proceeds of the sales of the brig and "effects," and of the negroes. Mr Chew, the collector, conjointly with the naval officers, filed a like claim, and the court having dismissed the claims of Roberts and the asserted "military captors," and allowed those of the collector and other officers of the customs, the cause was again brought before this court. 10 Wheat. 312.

This court, at February term 1825, decided that "the district court under the slave trade acts, have jurisdiction to determine who are the actual captors, under a state law made in pursuance of the fourth section of the slave trade act."

The court also decided, that "under the seventh section of this act of the 2d of March 1807, ch. 77, the entire proceeds of the vessel are forfeited to the use of the United States, unless the seizure be made by armed vessels of the navy or by revenue officers; in which case distribution is to be made in the same manner as prizes taken from the enemy."

The court also decided, "that under the act of the state of Louisiana, of the 13th of March 1818, passed to carry into effect the fourth section of the act of 1807, and directing the negroes imported contrary to the act to be sold, and the proceeds to be paid, 'one moiety for the use of the commanding officer of the capturing vessel, and the other moiety to the treasurer of the charity hospital of New Orleans, for the use and benefit of the said hospital,' no other

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person is entitled to the first moiety than the commanding officer of the navy or revenue cutter, who may have made the seizure under the seventh section of the act of congress."

The case having returned again to the district court of Louisiana, Mr Preston, as attorney general of that state, filed a claim on behalf of that state, setting forth the illegal importation of the negroes, that the greater part of them had been delivered over to the sheriff of New Orleans, that the sheriff had disposed of them under the law of the legislature of Louisiana, that the proceeds of the sale, \$68,000, were brought into the district court by the order of the court, and that part of the same remains deposited in court. He insisted that the money belongs to the state, and has been brought into court contrary to law and the rights of the state, and prays for an account, and that the said money may be paid over to him, so far as the same had not been disposed of conformably to the laws of Louisiana.

In the district court this claim was opposed on behalf of the United States.

The decree of the court was in favour of the claim, and an appeal was taken by the district attorney of the United States to this court.

The case was argued by Mr Berrien, attorney general and Mr Livingston for the United States; and by Mr Jones for the appellee.

For the appellants it was contended :

1. That the proceedings in the district court of Louisiana, upon the claim of the appellee, were irregular, the matter being of admiralty jurisdiction, and they should therefore have been by libel and monition.

2. That all proceedings relative to the matter in dispute had been regularly terminated by a final judgment of the supreme court of the United States.

3. That by the judgment of the supreme court, the whole beneficial interest in the proceeds in question has been adjudged to the United States.

4. That with regard to that moiety of the proceeds, which,

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by the law of Louisiana, was directed to be paid over to the treasurer of the charity hospital of New Orleans, the proper claimant was the treasurer.

5. That any claim of the attorney general of Louisiana to the money in the district court is unfounded; the sale of the negroes having been made without authority, and therefore void, and the whole amount of the sales having been paid without consideration; and as no title to the negroes was acquired by the purchase, the money belongs to those who paid the same to the sheriff of New Orleans. Upon this last point, and on no other, the opinion of the court was given.

For the United States it was argued, upon this point; that as the decision of this court in the case of the Josefa Segunda, reported in 5 and 10 Wheaton, had established the principle which ruled the case, that in reference to negroes brought into the United States under the circumstances attending their capture and introduction they were not placed under the power of the legislature of Louisiana, but for the purpose of being received by the sheriff of New Orleans for safe keeping; the sale made by the sheriff was invalid and without authority.

The provisions of the seventh section of the act of 1807 are repealed by the act of congress of 1819, "an act in addition to acts prohibiting the slave trade," 3 Story's Laws U. S. 1752.

By this act a change in the regulations before adopted by the United States in relation to persons of colour illegally introduced into the United States, was established.

The power given by the act of 1807 to the states to pass laws for the disposition of those persons was repealed by the act of 1819. The United States had before that time been unwilling to direct the mode in which those persons should be treated; and it was considered most proper to refer the same to the legislation of the particular states into which they might be brought. By the act of 1819 all such persons so found in the United States, were directed to be transported to Africa. That act authorises the president so to remove all negroes brought into the United States contrary to the act of 1807, and repeals all prior acts repugnant to its provisions. Be-

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fore the passage of the act of 1819 the negroes who were on board the Josefa Segunda had not been finally condemned; as there was an appeal from the decree of condemnation in the district court, depending and undecided, until February 1820.

Until the final condemnation by this court in 1820, the negroes remained in the hands of the sheriff of New Orleans, under the protection of the United States, not as the property of the United States or of Louisiana, but under their care. No rights were vested or could vest by the decree of the district court, as the appeal suspended the operation of that decree, until affirmed by this court in 1820.

The sale of the negroes did not and could not become valid by any consent of the parties before the district court. Until condemnation, undisturbed by an appeal, no rights existed in the court to order, or in the parties to consent to or authorise the sale.

When the case was disposed of in this court in 1820, the whole of the authority of the district court of Louisiana, which had been exercised in 1818, was at an end, and that court could not legally proceed in the case. The act of 1819 authorised the appointment of an agent, and provided funds for the purpose of removing all such persons, under the direction of the president of the United States, to Africa. It was a necessary consequence of this change in the policy of the government, that all the provisions of the law of 1807 repugnant to its purposes should be repealed, and they were repealed. The powers given to the courts to condemn, and the powers given to the states to legislate in reference to those persons, ceased at the passage of the law of 1819; and that law, notwithstanding the sale made by the sheriff, found those negroes among its objects, and it operated upon them fully and effectually. This court has decided that no effective disposition of them had been or could be made by the legislature of Louisiana, and they were consequently in the condition stated, and were the objects of the bountiful and liberal provisions of that law.

It cannot be maintained that the sale was authorised either by the act of 1807, or by the law of Louisiana. The act of

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1807 gave no power to the court to consent to or order the sale, and Louisiana could not interfere until after a sentence of condemnation, which should be final. The claimant, the Spanish owner of the brig could not give the right to sell. Such is the nature and such are the effects of admiralty proceedings. It follows therefore, that the money now in controversy was paid without consideration ; it belongs to the purchaser of the negroes ; and it cannot therefore under any circumstances belong to the state of Louisiana.

The sale has been made in the execution of a special power delegated by congress to the legislature of Louisiana.

It is fully established by the decisions of this court that special powers must be strictly pursued and cannot be exceeded. The act gave no other powers, and did not give this power.

If the negroes, instead of being sold, had been distributed among the parties to await the final decree, and after the act of 1819 had passed, the district court of Louisiana had ordered them to be delivered to the sheriff of New Orleans for sale ; looking to the provisions of the act of 1819 ; to the repeal of the act of 1807, giving the legislatures of the states power to order a sale of those persons ; to the provisions of the act of 1819 securing to them the privileges of freemen to be returned to their native country ; to the terms of that act which embrace negroes delivered to the officers of the United States before or after the date of this law ; could those persons be delivered to slavery ? Would they not rather be subject to the order of the president to be returned to Africa ? Can an illegal sale change the rights of the negroes.

Mr Jones, for the appellee, contended, that on the admissions of the counsel for the United States, if the act of 1819 did not operate on the case, one moiety of the money in dispute belonged to the charity hospital of New Orleans. The provisions of the act of 1807, taken together, forfeited the negroes, and gave the property in them or the proceeds of their sale to the state of Louisiana, by placing them at the disposition of the state. By that law, the negroes were to remain subject to such regulations as the state may make

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for the disposal of them. This gave the property in them to the state. Placing property at the disposal of a state necessarily gives the state the property. This flows essentially from the sovereign character of a state.

The provisions of the seventh section of the act of 1807, provide for the corporal delivery of the negroes to the state officers. In the custody of those officers they remained until condemnation, which, as soon as it occurs, reverts to the time of seizure. It gives no right, but ascertains it. The judicial proceedings confirm and improve it, but do not create it. The act of congress having declared to whose benefit the forfeiture incurred by the violation of its provisions shall accrue, and that being the state, the condemnation does but confirm it.

As to the invalidity of the sale, it was contended, that if the admiralty court had power to order a sale *pendente lite*, the agreement that the sale should be made was operative and equally effectual. The right of an admiralty court to do so exists under special circumstances : but consent supplied the necessity of such circumstances. It is to be presumed that there was an order of court to confirm the sale, as the money arising from it was deposited in the court under its order.

The property in the negroes having thus become that of the state of Louisiana, under the law of 1807 ; that state having appointed an officer to take charge of them, and legislated as to the disposal of them under the authority of that act ; the district court having condemned the negroes before the law of 1819, and that condemnation having established judicially the right of the state at the time of seizure ; the provisions of the law of 1819 could not affect rights thus given, vested and executed.

Mr Justice JOHNSON delivered the opinion of the Court.

The case of the Josefa Segunda has been twice already before this court : the first time upon the question of condemnation ; the second, upon the application of several claimants to be preferred in the distribution of the proceeds.

It now comes up upon a claim to the proceeds of the sale of the persons of colour found on board at the time of the

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seizure, interposed by the law officer of the state of Louisiana.

The vessel was condemned under the seventh section of the act of 1807, passed to abolish the slave trade. By the fourth section of the act, the state of Louisiana was empowered to pass laws for disposing of such persons of colour as should be imported or brought into that state, in violation of that law. The offence under the seventh section, on which this condemnation was founded, is not that of importing or bringing into the United States, but that of hovering on the coast with intent to bring in, persons of colour to be disposed of as slaves, contrary to law; and although it forfeits the vessel and any goods or effects found on board, it is silent as to disposing of the coloured persons found on board, any farther than to impose a duty upon officers of armed vessels, who may capture them, to keep them safely, to be delivered to the overseers of the poor, or the governor of the state, or persons appointed by the respective states to receive the same.

The state of Louisiana passed an act on the 13th of March 1818, which recites the provisions of the fourth and seventh sections of the acts of congress, and authorises and requires the sheriff of New Orleans to receive any coloured persons designated under either of those sections, and the same to keep, until the district or circuit court of the United States shall pronounce a decree upon the charge of illegal importation.

The second section makes provision for selling them upon receiving a certificate of such decision, and enjoins a distribution of the proceeds; one half to the commanding officer of the capturing vessel, the other to the treasurer of the charity hospital of New Orleans.

In pursuance of this law of the state, it appears, that after the decree of condemnation below, but pending the appeal in this court, the sheriff went on to sell, with the consent, it is said, of all parties; and \$65,000, the sum now in controversy, was deposited in the registry of the court below, to await the final disposal of the law.

The 20th of April 1818, congress passed another act on
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this subject, by the tenth section of which, the six first sections of the act of 1807 are repealed; but their provisions are re-enacted with a little more amplitude; and the fifth section of this act, which professes to reserve to the states the powers given in the former act, as well as the language of the repealing clause, in the saving which it contains as to offences; still confines all their provisions to the case of illegal importation; thus leaving the seventh section in force, but without any express power to dispose of the coloured persons, otherwise than to appoint some one to receive them.

And so likewise the seventh section of the act of 1818, which professes to confirm sales previously or subsequently made under the state laws, confines its provisions to sales made under condemnation for illegal importation; thus not comprising the cases of condemnation under the seventh section of the act of 1807, at least so far as relates to this offence.

The final condemnation in this court took place March 13th, 1820; but previous to that time was passed the act of March 3d, 1819, entitled, an act in addition to an act, prohibiting the slave trade; by which a new arrangement is made as to the disposal of persons of colour seized and brought in under any of the acts prohibiting the traffic in slaves. By the latter act, they are deliverable to the orders of the president; not of the states. And the repealing clause repeals all acts and parts of acts which may be repugnant to this act. So that if in the disposal of persons of colour brought into the United States, the provisions of this act embrace the case of such persons when brought in under the seventh section of the act of 1807, the power to deliver them to the order of the states was taken away before the final decree in this court.

Such, in the opinion of the court, is the effect of the act of 1819. And then the question is, how does it affect the present controversy.

Ever since the case of Yeaton *vs.* The United States, 5 Cranch, 286, the court has uniformly acted under the rule established in that case; to wit, that in admiralty causes a decree was not final while it was depending here. And any

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statute which governs the case, must be an existing, valid statute, at the time of affirming the decree below.

Whatever was the extent of the legal power of the state over the Africans, it is clear that such power could not be exercised finally over them at any time previous to the final decree of this court; we must therefore consider, whether, if they had been specifically before the court at the date of that decree, they must have been delivered up to the state, or the United States: clearly to the United States. And then this claim of the state cannot be sustained. We would not be understood to intimate, that the United States are entitled to this money; for they had no power to sell. Nor do we feel ourselves bound to remove the difficulties which grow out of this state of things.

With regard to the ground of irregularity: if not abandoned by the attorney general, it was but slightly touched upon, and we know of no other mode in the existing state of things, in which the rights of the parties could be reached, according to the course of the admiralty, but that here pursued.

On the question whether the decision in the second cause, in which the subject of this seizure was before us, was not final as to the rights of the United States, we are clearly of opinion, that it was not, as against this party. Although this question might then have been raised by the state, and could as well then have been settled; yet it was not raised, nor was it the interest of any of the parties then before the court, that it should be raised.

The decree below must be reversed.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and was argued by counsel; on consideration whereof, it is ordered, and decreed by this court, that the decree of the said district court in this cause be, and the same is hereby reversed, and that the said cause be, and the same is hereby remanded for further proceedings to be had therein according to law and justice, and in conformity to the opinion of this court.

**THE BANK OF THE UNITED STATES AND SAMUEL W. VENABLES'S
EXECUTORS vs. JOHN T. SWAN.**

Where an appeal has been dismissed, the appellant having omitted to file a transcript of the record within the time required by the rule of court, an official certificate of the dismissal of the appeal may not be given by the clerk during the term. The appellant may file the transcript with the clerk during the term, and move to have the appeal reinstated. To allow such a certificate would be to prejudge such a motion.

ON consideration of the motion made by Mr Wirt, of counsel for the appellee, for leave to take from the office of the clerk of this court, before the adjournment of the present term of this court, an official certificate of the dismissal of this appeal, dismissed last Saturday, being the 30th of January, of the present term of this court :

It is ordered that the said motion be overruled ; and that the leave prayed for be refused ; as under the practice of this court, the appellants would have a right during the present term to lodge a transcript of the record of said appeal with the clerk of this court, and move to have the appeal reinstated ; whereas to grant the present prayer or motion would be to prejudge such a motion. Per Mr Chief Justice MARSHALL.

BILL AND OTHERS, PLAINTIFFS IN ERROR vs. CUNNINGHAM AND
ANOTHER, DEFENDANTS IN ERROR.

C. & Co., merchants of Boston, owners of a ship proceeding on freight from Havana to the consignment of B. & Co. at Leghorn and to return to Havana, instructed B. & Co. to invest the freight, estimated at four thousand six hundred pesos; two thousand two hundred in marble tiles, and the residue, after paying disbursements, in wrapping paper. B. & Co. undertook to execute these orders. Instead however of investing two thousand two hundred pesos in marble, they invested all the funds which came into their hands in wrapping paper, which was received by the captain of the ship, and was carried to Havana, and there sold on account of C. & Co., and produced a loss, instead of the profit which would have resulted had the investment been made in marble tiles. As soon as information of the breach of orders was received, C. & Co. addressed a letter to B. & Co., expressing in strong terms their disapprobation of the departure from their orders, but did not signify their determination to disavow the transaction entirely, and consider the paper as sold on account of B. & Co. Held, that C. & Co. were entitled to recover damages for the breach of their orders; that their not having given notice to B. & Co. that the paper would be considered as sold on their account, did not injure their claim; and that the amount of the damages may be determined by the positive and direct loss arising plainly and immediately from the breach of the orders.

If the principal, after a knowledge that his orders have been violated by his agent, receives merchandize purchased for him contrary to orders, and sells the same without signifying any intention of disavowing the acts of the agent, an inference in favour of the ratification of the acts of the agent may fairly be drawn by the jury. But if the merchandize was received by the principal, under a just confidence that his orders to his agent had been faithfully executed, such an inference would be in a high degree unreasonable. [81]

The faithful execution of orders which an agent or correspondent has contracted to execute, is of vital importance in commercial transactions, and may often affect the injured party far beyond the actual sum misspent. A failure in this respect may entirely break up a voyage and defeat the whole enterprise. Speculative damages dependent on possible, successive schemes, ought not to be given in such cases; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate. [85]

The jury, in an action for damages for breach of orders, may compensate the plaintiff for actual loss, and not give vindictive damages. The profits which would have been obtained on the sale of the article directed to be purchased may be properly allowed as damages. [86]

THIS was a writ of error from the circuit court of Massachusetts, prosecuted by the defendant in the circuit court.

The bill of exceptions to the opinion of the court below

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sets forth the pleadings and evidence, and exhibited the following case.

Cunningham and Loring, merchants of Boston, owners of the brig Halcyon, Skinner master, chartered by them to proceed from Havana to Leghorn with a cargo of sugars, directed Bell, De Yough & Co. merchants at that place and consignees of the brig, to purchase for them, to be shipped to Havana by the Halcyon on her return to that port, a quantity of marble tiles and wrapping paper. The letter containing these instructions was dated 15 September 1824, and stated : "the whole amount of freight received at Leghorn will be about four thousand six hundred pesos : please invest two thousand two hundred in marble tiles ; the balance, after paying disbursements, please invest in wrapping paper." "We have further engaged whatever may be necessary to fill the brig on half profits, on account of which seven hundred pesos are to be paid in Leghorn : after purchasing tiles and paying disbursements, you will invest the balance in paper."

A duplicate of this letter was forwarded, to which the following postscript was added.

"P. S. We have further engaged whatever may be necessary to fill the brig, on half profits, on account of which seven hundred pesos are to be paid in Leghorn. After purchasing the tiles and paying disbursements, you will invest the balance in paper, as before mentioned. In previous orders the reams have been deficient in the proper number of sheets. We will thank you to pay particular attention to this, as well as having all the sheets entire."

"This letter was received by the plaintiffs in error on the 13th of November 1824, and on the 9th of the December following they addressed a letter to Cunningham and Loring, in which they stated,

"The order you are pleased to give us for paper and marble tiles, to be paid for out of the freight of the Halcyon from Havana, to our consignment, has our particular attention.

"You have done very right to send on this order, as the wrapping paper cannot be got in readiness before the end

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of January, and therefore had it been delayed longer, could not have been in time for your brig Halcyon.

"We have contracted for *five thousand* reams, at as near your limits as possible, the article being just now in great demand. The tiles shall be collected also."

On the 14th of January 1825 they wrote to Cunningham and Loring :

"The wrapping paper ordered by yours of the 15th of September, will be in readiness by the end of this month, and we shall have by that time, ready to ship, ten thousand marble tiles of twelve ounces, seven thousand six hundred of fourteen ounces, and six thousand two hundred of sixteen ounces, which will be about the investment you desire of the freight from the Halcyon."

On the 21st of January 1825, the plaintiffs in error informed the defendants of the arrival of the Halcyon, and on the 21st of February they addressed them another letter, stating, "The sample of wrapping paper sent us by Messrs Murdoch, Storcy & Co. we found much inferior to any made in this state, and have executed your order with a much better article, although the difference in price bears no proportion. As your account current after purchasing the paper, which captain Skinner told us was the better article for investment, gave only a small balance, we increased a little one quantity of paper, and sent no tiles.

"We now hand you bill of lading and invoice, amounting to *P2801 18* for 473 packages of wrapping paper, shipped for your account and risk, on board your brig Halcyon, John Skinner master, which if found right, please to pass accordingly.

"Captain Skinner has been made aware of the superior quality of this parcel of paper, and that each ream is composed correctly of twenty quires of twenty-four and not sixteen sheets, as has been occasionally shipped ; so that he will no doubt make an adequate price for it, because in reality the prices at which it is invoiced, are reduced, by this difference, below those mentioned in your order."

The account current stated the investment of pctsos 2801 18 in wrapping paper, and showed that the balance

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of the freight and other assets in the hands of the plaintiffs in error, belonging to Cunningham and Loring, had been absorbed in the disbursements of the brig, &c.

The Halcyon proceeded to Havana, and there the paper shipped by the plaintiffs in error was sold, and the proceeds accounted for to Cunningham and Loring by their agents at that port. Had the marble tiles been shipped as ordered, there would have been a considerable profit in the transactions, instead of the heavy loss sustained on the sales of the paper.

Cunningham and Loring, on being advised of the non-compliance, by the plaintiffs in error, with their instructions of the 15th of September 1824, addressed the following letter to them :

Boston, April 18th, 1825.

MESSRS BELL, DE YOUSEH, & Co.

Gentlemen: We have received your favour of February 21st. The following are extracts of our letter to you of 13th September, directing the investment of the freight per Halcyon. "The whole amount of freight received at Leghorn will be about 4600 pesos : please invest 2200 in marble tiles ; the balance, after paying disbursements, please invest in wrapping paper. We have further engaged whatever may be necessary to fill the brig, on half profits, on account of which 700 pesos are to be paid in Leghorn : after purchasing the tiles and paying disbursements, you will invest the balance in paper."

We are exceedingly disappointed that such positive directions were not complied with : they were given for sufficient reasons, and without authority to alter them. You omitted to invest the 700 pesos on account of the freight of 150 boxes marked T, which we regret, as we wished the funds at Havana ; with this you would have had 4240 pesos, which would have furnished the tiles, paid disbursements, and left 1393 pesos to be invested in paper.

Very respectfully,

CUNNINGHAM AND LORING.

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One of the partners of the firm being in Boston in 1827, an action was instituted against the plaintiffs in error, in the court of common pleas of the county of Suffolk, for damages for the loss sustained by the plaintiffs, by the conduct of the defendants; and on their petition, the defendants in the suit being aliens, was removed to the circuit court of the United States for the district of Massachusetts.

On the trial of this cause in the circuit court, it was in evidence that the tiles ordered by the plaintiffs in the suit, could have been procured by the defendants, and at prices which would have produced a profit to the plaintiffs.

During the trial, exceptions were taken to the opinion of the court, by the defendants in the circuit court, which exceptions are stated in the opinion of this court, and a verdict and judgment having been rendered for the plaintiffs, the defendants prosecuted this writ of error.

The case was argued by Mr Ogden for the plaintiffs in error, and by Mr Webster for the defendants.

For the plaintiffs it was contended, that the circuit court had erred in leaving to the jury the construction of the correspondence between the plaintiffs in the court below and the defendants, of the 15th September 1824. The evidence being written, the construction of it was exclusively with the court. The course adopted by the defendants was in full accordance with the objects of the latter, as the paper could not be procured without previous orders, and they having been given, and the defendants bound to take the paper so ordered, they were necessarily without the funds required to purchase the tiles.

The plaintiffs below were bound to give the defendants notice of their intention to claim damages from them for non-compliance with instructions, and their neglect to do this, as well as their having received the proceeds of the paper, was a waiver of all their claims. The letter of the 18th April 1825 was not such a notice.

The rule adopted in the assessment of the damages was incorrect. The plaintiffs below were entitled to no more than the difference between the cost of the paper which had

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been shipped at Leghorn, and the price of tiles at that place. Cited, 1 Vez. Jun. 509.

Mr Webster, for the defendants in error, said that there were no questions of law in the case which presented any difficulty, and the facts clearly established a claim by the defendants on the plaintiffs in error for a manifest breach of instructions, and upon these facts the jury had given their verdict. As to the rule adopted by the jury for the assessment of the damages, they had exercised their sound discretion without any instructions from the court which interfered with this their peculiar province.

As to the notice of claim, by the defendants in error, of the 18th of April 1825, it was sufficient. They might have rejected the articles altogether, or have received the proceeds arising from their sale in the regular course of trade, and claimed, as they have in this case, damages for the loss.

Notice of claim is not necessary. If the party does not intend to refuse the article altogether, it is not required; and the neglect to do so is no bar to a claim for damages.

In this case the letter of the defendants is an express disavowal of the acts of their agents. Cited, *Lorain vs. Cartwright*, 3 Wash. C. C. R. 151.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

This is a writ of error to a judgment rendered in the court of the United States, for the first circuit and district of Massachusetts, in a suit brought by Cunningham & Co. against Bell, De Yough & Co., on a special contract.

Cunningham & Co., merchants of Boston, had let their vessel, the Halcyon, to Messrs Atkinson and Rollins, of the same place, to carry a cargo of sugars from the Havana to Leghorn. The cargo was consigned to Messrs Bell, De Yough & Co., merchants of Leghorn; and Cunningham & Co. addressed a letter to the same house, instructing them to invest the freight, which was estimated at four thousand six hundred pesos, two thousand two hundred in marble tiles, and the residue after paying disbursements in wrapping

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paper. Messrs Bell, De Yough & Co. undertook to execute these orders. Instead however of investing the sum of two thousand two hundred pesos in marble tiles, they invested the whole amount of freight which came to their hands, amounting to three thousand four hundred and forty-nine pesos, and seven-thirds, instead of four thousand six hundred, in wrapping paper, which was received by the captain of the *Halcyon*, shipped to the Havana, and sold on account of Messrs Cunningham & Co. One of the partners of Messrs Bell, De Yough & Co. having visited Boston on business, this suit was instituted against the company. At the trial, all the correspondence between the parties was exhibited, from which it appeared that Cunningham & Co. as soon as information was received that their orders had been broken, addressed a letter to Messrs Bell, De Yough & Co., expressing in strong terms their disapprobation of this departure from orders, but did not signify their determination to disavow the transaction entirely, and consider the wrapping paper as sold on account of the house in Leghorn.

In addition to the correspondence, several depositions were read to the jury, which proved that the orders respecting the marble tiles might have been executed without difficulty, but that the house in Leghorn, expecting to receive more money on account of freight than actually came to their hands, had contracted for so much wrapping paper as to leave so inconsiderable a sum for the tiles, that they determined to invest that small sum also in wrapping paper.

At the trial, the counsel for the defendants in the court below, prayed the court to instruct the jury on several points which arose in the cause. Exceptions were taken to the rejection of these prayers, and also to instructions which were actually given by the court, and the cause is now heard on these exceptions.

The defendants' counsel prayed the court to instruct the jury, that the letter of the 9th of December 1824, from the defendants to the plaintiffs, was notice to them of the exercise of the aforesaid authority in contracting for five thousand reams of paper, to be paid for out of the freight money of the *Halcyon*, and was admitted by the plaintiffs in their

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letter of the 7th of March 1825, to be a rightful exercise of such authority; and that the freight money of the *Halcyon* was pledged for payment of the said quantity of paper.

But the court so refused to instruct the jury, because it did not appear, on the face of the said letter, at what price the said wrapping paper was purchased, so as to put the plaintiffs in possession of the whole facts, that there had been a purchase of paper to an extent, and at a price which would amount to a deviation from the orders of the plaintiffs, or that defendants had deviated from such orders, without which there could arise no presumption of notice of any deviation from such orders, or of any ratification of any such deviation from such orders. But the court did instruct the jury, that if, from the whole evidence in the case, the jury were satisfied that the letter of the 9th of December, connected with the letter of the 14th of January, did sufficiently put the plaintiffs in possession of all the facts relative to such purchase, and the price thereof, and of such deviation, and that the letter of the 7th of March, in answer thereto, was written with a full knowledge and notice of all the facts, and that the plaintiffs did thereupon express their approbation of all the proceedings and acts of the defendants relative to such purchase, then, in point of law, it amounted to a ratification thereof, even though there had been a deviation from the orders in this behalf.

This first exception is very clearly not supported by the fact, and was very properly overruled for the reasons assigned by the judge. The plaintiffs in that court, when the letter of the 7th of March 1825 was written, had no reason to presume that their orders had been violated, and consequently could not be intended to mean by that letter to sanction such violation.

The said defendants' counsel further prayed the court to instruct the jury, that, if they believed, from the evidence submitted to them, that the required quantity of tiles could be had in season for the return cargo of the *Halcyon*, without any previous contract therefor, and that the five thousand reams of paper could not be had in season for said vessel, without a previous contract therefor, that, inasmuch as the

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plaintiffs admit, in their declaration, that they did not furnish the defendants with freight money enough to purchase twenty-two hundred pesos worth of tiles, and pay the disbursements, and pay for the said five thousand reams of wrapping paper, but only with three thousand four hundred and forty-nine pesos, 7.3, (as in their declaration is expressed), and which latter sum was only sufficient for the payment of said disbursements, and for the performance of the defendants' own contract in paying for said wrapping paper, the defendants were not holden to purchase any tiles, but were holden to ship the said five thousand reams of paper on board the Halcyon, as the property of the plaintiffs.

But the court refused so to instruct the jury; and the court did instruct the jury, that if the defendants undertook to comply with the original written orders of the plaintiffs, and no deviation therefrom was authorised by the plaintiffs, the defendants were bound, if funds to the amount came into their hands, in the first instance to apply two thousand two hundred pesos of the funds which should come into their hands and be applied to this purpose, to the purchase of tiles, and in the next place, to deduct and apply as much as was necessary to pay the disbursements, and then to apply the residue to the purchase of paper: that if it were necessary or proper under the circumstances to make a purchase of the paper, before the arrival of the vessel, the defendants were authorised to act upon the presumption that four thousand six hundred pesos would come into their hands, and therefore the plaintiffs would have been bound by any purchase of paper made by the defendants, to the amount of the balance remaining of the said four thousand six hundred pesos, after deducting the two thousand two hundred pesos for tiles, and the probable amount of such disbursements. But that it was the duty of the defendants, if they had funds, to deduct in the first instance, from the whole amount, two thousand two hundred pesos for tiles; and if they did not, but chose to purchase paper without any reference thereto, it was a deviation from the plaintiffs' orders, and unless ratified by the plaintiffs, the defendants

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were answerable therefor: that if the defendants had purchased paper, before the arrival of the vessel, to the amount only of such residue or balance as aforesaid, and the funds had afterwards fallen short of the expected amount of four thousand six hundred pesos, the defendants were not bound to apply any more than the sum remaining in their hands, after deducting the amount of such purchase of paper, and such disbursements, to the purchase of tiles: and that after the receipt of the letters of the 20th of September, and the duplicate of the 15th of September, if the defendants undertook to perform the orders therein contained, there was an implied obligation on them to apply the seven hundred pesos mentioned therein for the plaintiffs' benefit, to the purposes therein stated: that, to illustrate the case, if the jury were satisfied that the whole funds which came into the hands of the defendants for the plaintiffs (independent of the seven hundred pesos) were three thousand four hundred and fifty pesos, then the said seven hundred pesos should be added thereto, as funds in the defendants' hands, making in the whole four thousand one hundred and fifty pesos.

In the view of the facts thus assumed by the court, and to illustrate its opinion, the practical result under such circumstances would be thus: the defendants were authorised to act on the presumption of funds to the amount of four thousand six hundred pesos. Deduct two thousand two hundred pesos for tiles and six hundred and fifty for probable disbursements, the balance left to be invested in paper would be one thousand seven hundred and fifty. The defendants would then be authorised, if the circumstances of the case required it, to contract for, or purchase, to the amount of one thousand seven hundred and fifty pesos in paper, before the arrival of the vessel: and if the funds should afterwards fall short of the expected amount of four thousand six hundred pesos, the sum of one thousand seven hundred and fifty pesos, and the disbursements, say six hundred and fifty pesos, were to be first deducted out of the funds received, and the balance only invested in tiles. That if the

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funds which actually came to the defendants' hands (without the seven hundred petsos), and the sum of seven hundred petsos were also received, the whole amount would be four thousand one hundred and fifty petsos; then the defendants would be justified in deducting therefrom, for the purchase of paper, one thousand seven hundred and fifty petsos, and disbursements six hundred and fifty petsos; leaving the sum of one thousand seven hundred and fifty petsos to be invested in tiles: and to this extent, if there was ratification, the defendants would be bound to invest for the plaintiffs in tiles, and were guilty of a breach of orders if they did not so invest, and the plaintiffs entitled to damages accordingly. But the court left the whole facts for the consideration of the jury, and stated the preceding sums only as illustrations of the principles of decisions, if they were found conformable to the facts.

This prayer was properly overruled for the reasons assigned by the court. The orders were peremptory to apply two thousand two hundred petsos in the first instance to the purchase of tiles. The residue only of the funds which came to the hands of Bell, De Yough and Co. was applied to the purchase of wrapping paper; and the instruction that Bell, De Yough and Co. were justifiable in acting on the presumption that the whole sum mentioned in the letter of Cunningham and Co. would be received; and in contracting by anticipation for wrapping paper on that presumption, was as favourable to Bell, De Yough and Co. as the law and evidence would warrant. The only questionable part of the instruction is that which relates to the seven hundred petsos, mentioned in the postscript of that copy of the letter of the 15th of September 1824 which went by the *Halcyon*. That postscript is in these words: "P. S. We have further engaged whatever may be necessary to fill the brig on half profits, on account of which seven hundred petsos are to be paid in Leghorn. After purchasing the tiles and paying the disbursements, you will invest the balance in paper as before mentioned. In previous orders the reams have been deficient in the proper number of sheets. We will thank you

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to pay particular attention to this, as well as having all the sheets entire."

The court instructed the jury that if the defendants undertook to perform the orders, there was an implied obligation on them to apply the seven hundred pesos mentioned therein to the purposes therein mentioned.

No doubt can be entertained of the existence of this implied obligation if the seven hundred pesos were in fact received. This fact however could not be decided by the court, and was proper for the consideration of the jury. If the court took it from them, the instruction would be erroneous. Some doubt was at first entertained on this part of the case; but on a more attentive consideration of the charge that doubt is removed. The declaration that there was an implied obligation to apply the seven hundred pesos as directed in the letter and postscript, is not made in answer to any prayer for an instruction respecting the reception of this money, but respecting its application. The answer therefore which relates solely to the application ought not to be construed as deciding that it was received. The judge afterwards, by way of illustration, shows the sum which might have been invested in wrapping paper consistently with the orders given by Cunningham and Co. on the hypothesis that the freight money would amount to four thousand six hundred pesos, and also on the hypothesis that the additional seven hundred pesos were received; and adds: "But the court left the whole facts for the consideration of the jury, and stated the preceding sums only as illustrations of the principles of decisions, if they were found conformable to the facts." We think then that the question, whether the seven hundred pesos were actually received by Bell, De Yough and Co. was submitted to the jury on the evidence, and that there is no error in this instruction.

The defendants' counsel did further pray the court to instruct the jury that inasmuch as the plaintiffs admit, in their declaration, that the freight money received by the defendants was three thousand four hundred and forty-nine pesos 7.3; and it appearing that the whole of that sum had been ab-

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sorbed in the purchase of five thousand reams of wrapping paper, disbursements, and reasonable and customary charges; and that as the said plaintiffs did accept and sell the said five thousand reams of paper on their own account at the Havana; that such receipt and sale of the paper on their account, is, *in law*, a ratification of the acts of the defendants at Leghorn, in the application of the whole of said freight money.

But the court refused so to direct the jury, because the instruction prayed for assumed the decision of matters of facts, and because the plaintiffs did not admit that the sum of three thousand four hundred and forty nine pesos 7.3 was the whole sum or funds received as freight money by the defendants, but contended that the additional sum of seven hundred pesos was so received, and ought to be added thereto; and because, whether the receipt and sale of the paper at Havana was a ratification of the acts of the defendants at Leghorn or not, was matter of fact for the consideration of the jury, under all the circumstances of the case, and not matter of law to be decided by the court in the manner prayed for.

We think this instruction was properly refused by the court for the reasons assigned by the judge. It may be added in support of the statement made by the court, that though the first and second new count in the declaration claim only the sum mentioned by counsel in their prayer, the third claims a larger sum, and consequently left the plaintiffs in the court below at liberty to ask from the jury such sum within the amount demanded by the third count as the evidence would in their opinion prove to have come to the hands of the defendants. The question whether the receipt and sale of the sugars at the Havana amounted to a ratification of the acts of Bell, De Yough and Co. at Leghorn, certainly depended on the circumstances attending that transaction. If Cunningham and Co., with full knowledge of all the facts, acted as owners of the wrapping paper without signifying any intention of disavowing the acts of their agents, an inference in favour of ratification might be fairly

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drawn by the jury. If the cargo from Leghorn was received and sold in the Havana under directions given at a time when Cunningham and Co. felt a just confidence that their orders would be faithfully executed by Bell, De Yough and Co. such an inference would be in a high degree unreasonable. This subject was therefore very properly left to the jury.

And the defendants' counsel furthermore prayed the court to instruct the jury, as the plaintiffs' *first new count*, filed at this term, by leave of court, that, inasmuch as the plaintiffs have set forth the letter of the plaintiffs to the defendants of the 15th of September 1824, as containing the special contract between the plaintiffs and defendants; and as the postscript to that letter contains a material part of the contract; and as the said postscript is not set forth in said count as part of said letter, but as *wholly omitted*; that the evidence offered by the plaintiffs, in this behalf, does not support and prove the contract as in that count is alleged.

But the court refused so to instruct the jury, being of opinion that the said postscript did not necessarily as a matter of law establish any variance between the first new count and the evidence in the case; and the court left it to the jury to consider upon the whole evidence in the case, whether that count was established in proof, and if in their opinion there was a variance, then to find their verdict for the defendants on that count.

On the 15th of September 1824, Cunningham and Co. addressed a letter to Bell, De Yough and Co. containing the orders which have given rise to this controversy. This letter was sent by the Halcyon, and contained the postscript mentioned in this prayer for instructions to the jury. It was received on the 20th of January 1825.

As the Halcyon was to make a circuitous voyage by the Havana, and Cunningham and Co. were desirous of communicating the contents of their letter by that vessel previous to her arrival, a duplicate was sent by the Envoy, which sailed a few days afterwards direct for Leghorn.

In this letter the postscript was omitted. It was received

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on the 30th of November 1824, and was answered soon afterwards with an assurance that the orders respecting the tiles and wrapping paper would be executed.

The first new count in the declaration is on the special contract, and sets out at large the letter sent by the Envoy, which was first received, and to which the answer applied; in which Bell, De Yough and Co. undertook to execute the orders that were contained in that letter. It is undoubtedly true that a declaration which proposes to state a special contract in its words, must set it out truly; but this contract was completed by the answer to the letter first received, and the obligation to apply the funds when received was then created. The plaintiffs below might certainly count upon this letter as their contract. Other counts in the declaration are general, and both letters may be given in evidence on them. The defendants might have objected to the reading of the letter by the Halcyon on the first new count; but the whole testimony was laid before the jury without exception, and the counsel prayed the court to instruct the jury that as the postscript was omitted in the letter stated in the first count, the evidence did not support the contract as in that count alleged.

This prayer might perhaps have been correctly made, had no other letter been given in evidence than that received by the Halcyon. But as the very letter on which the count is framed, and which was the foundation of the contract was given in evidence, the court could not have said with propriety that this count was not sustained. It was left to the jury to say whether there was a variance between the evidence and this count, and if in their opinion such variance did exist, they were at liberty to find for the defendants on that count. If there was any error in this instruction, it was not to the prejudice of the plaintiffs in error.

The fifth, sixth and seventh exceptions appear to have been abandoned by the counsel in argument, and were certainly very properly abandoned. These several prayers are founded on the assumption of contested facts, which were submitted and ought to have been submitted to the jury.

The eighth and last prayer is in these words: "The de-

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defendants' counsel prayed the court to instruct the jury, that if they should find that any contract or promise was made by the defendants as to the purchase and shipment of twenty-two hundred pesos worth of tiles, and not performed, (but broken), that the measure of damages was the value of the said sum of twenty-two hundred pesos at *Leghorn* and not at Havana: and that as the plaintiffs have taken and accepted another article of merchandise at Leghorn, viz. five thousand reams of wrapping paper, of greater value than two thousand two hundred pesos, and which was purchased with the same moneys which plaintiffs aver should have been invested in marble tiles as aforesaid, the plaintiffs are not entitled to recover any damages in this action.

But the court refused so to instruct the jury, because the instruction prayed for called upon the court to decide on matters of fact in controversy before the jury. And the court did instruct the jury, that if upon the whole evidence they were satisfied that the orders of the plaintiffs had been broken by the defendants in not purchasing the tiles in the manner stated in the declaration, and that there had been no subsequent ratification by the plaintiffs of the acts and proceedings of the defendants; then that the plaintiffs were entitled to recover their damages for the breach thereof; that what the proper damages were, must be decided by them upon the whole circumstances of the case; that in their assessment of damages they were not bound to confine themselves to the state of things at Leghorn, and they were not precluded from taking into consideration the voyage to the Havana, and the fact of the arrival of the vessel there, the state of the markets, and the profits which might have been made by the plaintiffs, if their orders as to the tiles had been complied with; that the court would not lay down any rule for their government, except that they were at liberty to compensate the plaintiffs for their actual losses sustained, as a consequence from the default of the defendants, but they were not at liberty to give vindictive damages.

This prayer consists of two parts. 1st. The measure of damages if the jury should be of opinion that the contract was broken. 2. The ratification of the acts of Bell, De

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Yough, and Co, by accepting at Havana another article in lieu of the tiles.

1. The measure of damages. The plaintiffs in error contend, that the value of the money at Leghorn, which ought to have been invested in tiles, and not its value at the Havana, ought to be the standard by which damages should be measured. That is, if his views are well understood, that the value of two thousand two hundred pesos at Leghorn, with interest thereon, and not the value of the tiles in which they ought to have been invested at the Havana, ought to be given by the jury.

This instruction ought not to have been given unless it be true, that special damages for the breach of a contract can be awarded under no circumstances whatever; that an action for the breach of contract was equivalent, and only equivalent, to an action for money had and received for the plaintiffs' use. That the breach of contract consisted in the non-payment of two thousand two hundred pesos; not in the failure to invest that sum in tiles. In fact, that under all circumstances, if no money came to the hands of the defendants, the damages in such an action must be nominal. This can never be admitted.

The faithful execution of orders which an agent or correspondent has contracted to execute, is of vital importance in commercial transactions, and may often affect the injured party far beyond the actual sum misapplied. A failure in this respect may entirely break up a voyage, and defeat the whole enterprise. We do not mean that speculative damages, dependent on possible successive schemes, ought ever to be given; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate. Thus in this case—an estimate of possible profit to be derived from investments at the Havana, of the money arising from the sale of the tiles, taking into view a distinct operation, would have been to transcend the proper limits which a jury ought to respect; but the actual value of the tiles themselves, at the Havana, affords a reasonable standard for the estimate of damages. The instructions of the judge seem to contemplate this course, and his restraining

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power would have corrected, by granting a new trial, any great excess in this particular. The rule that the jury was to compensate the plaintiffs for *actual* loss, and not to give vindictive damages, is thought by this court to have been correct. The declaration expressly claims the loss of the profits which would have accrued from the sale of the tiles.

That part of this prayer which relates to the ratification of the acts of Bell, De Yough, and Co. by the receipt of the wrapping paper at the Havana, has been fully noticed in the observations on the third exception.

This court is of opinion that there is no error in several instructions given by the circuit court to the jury, and that the judgment ought to be affirmed with costs and six per cent damages.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Massachusetts, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

**GEORGE B. MAGRUDER, PLAINTIFF IN ERROR vs. THE UNION BANK
OF GEORGETOWN, DEFENDANTS IN ERROR.**

An action was brought by the Union Bank of Georgetown against George B. Magruder as indorser of a promissory note drawn by George Magruder. The maker of the note died before it became payable, and letters of administration to his estate were taken out by the indorser. No notice of the non-payment of the note was given to the indorser, or any demand of payment made until the institution of this suit. Held, that the indorser was discharged, and his having become the administrator of the drawer does not relieve the holder from the obligation to demand payment of the note, and to give notice thereof to the indorser.

The general rule, that payment must be demanded from the maker of a note, and notice of non-payment forwarded to the indorser within due time, in order to render him liable, is so firmly settled that no authority need be cited to support it. Due diligence to obtain payment from the maker, is a condition precedent, on which the liability of the indorser depends. [90]

IN the circuit court of the district of Columbia, for the county of Washington, the defendants in error instituted a suit against George B. Magruder, the plaintiff in error, upon a promissory note drawn by George Magruder in favour of and indorsed by the plaintiff in error, dated Washington, November 8th, 1817; for six hundred and forty-three dollars twenty-one cents, payable seven years after date. After the making of the note, the drawer, George Magruder, died, and on the 18th of November 1822, administration of his effects was granted to George B. Magruder, the plaintiff in error. The note having been due on the 11th of November 1824, was not paid.

Upon the trial of the cause, the plaintiff, in support of the issue joined, offered in evidence to the jury the promissory note, issued the 18th of November 1823, the hand writing of the maker, and the indorsement by the defendant having been admitted; and further proved that the defendant had, previous to the note falling due, taken out letters of administration in the county of Montgomery, in the state of Maryland, upon the personal estate of George Magruder, the maker of the said note, on the 18th of November 1823; the

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said George Magruder having previously departed this life. It was admitted that the note in question had never been protested, nor had any notice been given to this defendant that the note was not paid. Upon these circumstances, the counsel for the defendant moved the court to instruct the jury, that before the plaintiff can recover in this action, it is essential for him to prove demand and notice to the indorser, of the non-payment; which not being done, the verdict should be for the defendant. But the court refused to give the instruction prayed for as aforesaid, and charged the jury, that no demand of notice of non-payment was necessary. To this refusal and instruction the counsel for the defendant excepted, and the court sealed a bill of exceptions, and this writ of error was prosecuted.

The case was argued by Mr Coxe for the plaintiff in error, and by Mr Dunlop and Mr Key for the defendant.

Mr Coxe contended, that the fact that the indorser of the note had become the administrator of the drawer, did not release the holders of the note from any of the duties and legal obligations they were under, to give notice to the indorser of the non-payment of the note, and that payment was expected from him. The letters of administration were granted out of the district of Columbia; but if they had been issued within the district, the law would have been the same.

As a general rule, notice was necessary, and notice must come from the holder of the note, to apprise the party that he is looked to for payment. Chitty, 292.

The mere fact that the indorser had been the representative of the drawer, did not imply a knowledge of the non-payment of the note; and if it did, notice of its non-payment was not thereby dispensed with. Chitty, 293. 1 T. Rep. 167. 2 Con. Rep. 654. The legal obligations of an indorser become complete on notice, and are not such until notice.

The obligation to give notice has been declared to exist in a case in which, if it ever could be excused, it would have been waived under its circumstances. Where one person

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was a member of two partnerships, one of which signed, and the other of which indorsed, it was held, that presentment for payment was necessary to charge the indorser. Bayley on Bills, 159.

Mr Dunlop and Mr Key, for the defendant, admitted the general rule to be as stated by the counsel for the plaintiff in error; but exceptions had been allowed to the rule, and on the same principles, the present was entitled to exemption from its stricter application.

In the *Bank of Columbia vs. French*, 4 Cranch, 161, when this note was drawn for the use of the indorser, notice was not required. His knowledge that the obligation to pay was upon him, made the notice unnecessary.

The plaintiff in error, as administrator of the drawer, became the payer of the note, and as such was bound to do so without demand; no demand on him being required, it was useless to give him notice that he had not done what he well knew he had omitted.

The purpose of the rule as to notice did not exist here: if notice was required to enable the indorser to secure himself by calling on the drawer, this could not be done; and as he had the estate of the drawer in his hands for his indemnity, no demand of the indorser was necessary. *Bank of the United States vs. Corneal*, 2 Peters, 552.

The law never requires that to be done which is useless; and therefore the defendant in error, who could not by the notice or by its omission have affected the rights of the indorser, or his means of protecting himself from loss, was not required to give it.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

This action was brought by the Union bank of Georgetown against George B. Magruder, as indorser of a promissory note made by George Magruder. The maker of the note died before it became payable; and letters of administration on his estate were taken out by the indorser. When the note became payable, suit was commenced against the indorser,

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without any demand of payment other than the suit itself, without any protest for non-payment, and without any notice that the note was not paid, and that the holder looked to him as indorser for payment. Upon these circumstances the counsel for the defendant moved the court to instruct the jury, that before the plaintiff can recover in this action, it is essential for him to prove demand, and notice to the indorser of the non-payment; which not being done, the verdict should be for the defendant. But the court refused to give this instruction, and charged the jury, that no demand or notice of non-payment was necessary. To this opinion the counsel for the defendant in the circuit court excepted, and has brought the cause to this court by writ of error.

The general rule that payment must be demanded from the maker of a note, and notice of its non-payment forwarded to the indorser within due time, in order to render him liable, is so firmly settled that no authority need be cited in support of it. The defendant in error does not controvert this rule, but insists that this case does not come within it; because demand of payment and notice of non-payment are totally useless, since the indorser has become the personal representative of the maker. He has not however cited any case in support of this opinion, nor has he shown that the principle has been ever laid down in any treatise on promissory notes and bills. The court ought to be well satisfied of the correctness of the principle, before it sanctions so essential a departure from established commercial usage.

This suit is not brought against George B. Magruder as administrator of George Magruder, the maker of the note, but against him as indorser. These two characters are as entirely distinct as if the persons had been different. A recovery against George B. Magruder, as indorser, will not affect the assets in his hands as administrator. It is not a judgment against the maker, but against the indorser of the note. The fact that the indorser is the representative of the maker does not oppose any obstacle to proceeding in the regular course. The regular demand of payment may be made, and the note protested for non-payment, of which notice may be given to him as indorser with as much facility as if the indorser had

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not been the administrator. It is not alleged that any difficulty existed in proceeding regularly ;—the allegation is, that it was totally useless.

The note became payable on the 8th day of November 1824. The writ was taken out against the indorser on the 26th day of April 1825. If this unusual mode of proceeding can be sustained, it must be on the principle that, as the indorser must have known that he had not paid the note, as the representative of the maker, notice to him was useless. Could this be admitted : does it dispense with the necessity of demanding payment ? It is possible that assets which might have been applied in satisfaction of this debt, had payment been demanded, may have received a different direction. It is possible that the note may have been paid by the maker before it fell due. Be this as it may, no principle is better settled in commercial transactions, than that the undertaking of the indorser is conditional. If due diligence be used to obtain payment from the maker, without success, and notice of non-payment be given to him in time, his undertaking becomes absolute ; not otherwise. Due diligence to obtain payment from the maker, is a condition precedent, on which the liability of the indorser depends. As no attempt to obtain payment from the maker was made in this case, and no notice of non-payment was given to the indorser, we think the circuit court ought to have given the instruction prayed for by the defendant in that court.

The judgment is reversed, and the cause remanded, with directions to award a *venire facias de novo*.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby reversed, and that the said cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo* in said cause.

**ROBERT CHINOWETH, JAMES TRACY AND THOMAS WILMOUTH,
PLAINTIFFS IN ERROR vs. THE LESSEE OF BENJAMIN HASKELL
AND OTHERS, DEFENDANTS.**

The defendant in the court below having withdrawn his cause from the jury by a demurer to evidence, or having submitted to a verdict for the plaintiff, subject to the demurer, cannot hope for a judgment in his favour, if by any fair construction of the evidence the verdict can be sustained. [96]

It is an obvious principle that a grant must describe the land to be conveyed, and that the subject granted must be identified by the description given of it in the instrument itself. The description of the land consists of the courses and distances run by the surveyor, and of the marked trees at the lines and corners, or other natural objects which ascertain the very land which was actually surveyed. [96]

If a grant be made which describes the land granted by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance though not safe guides are the only guides given, and must be used. [96]

The line which forms the western boundary of the land intended to be granted was never run or marked. In his office the surveyor assumed a course and distance, and terminates the line at two small chesnut oaks. But where are we to look for those two small chesnut oaks in a wilderness in which one man takes up fifty thousand acres and another one hundred thousand? or how are we to distinguish them from other chesnut oaks. The guide, and the only guide given us by the surveyor or by the grant, is the course and distance. [96]

It is admitted that the course and distance called for in a grant may be controlled and corrected by other objects of description which show that the survey actually covered other ground than the lines of the grant would comprehend. [98]

WRIT of error to the district court of the western district of Virginia.

This case was argued by Mr Doddridge, for the plaintiff in error, no counsel appearing for the defendant. He contended :

1. That Wilson does not prove the making of any actual survey of the three last lines, and all that he does prove is that he protracted them.
2. That in protracting the line D. E. he guessed at a course

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and distance which he supposed would reach Young's corner; which he missed about five miles.

3. That he only proves it to have been his intention to go to Young's corner. He did not in this certificate of survey call for a corner to Young, but only for two chesnut oaks in a country where there is scarcely any other timber.

4. That course and distance, as called for, may be corrected by other matters of description in the certificate and grant, by any natural call or description which may identify a corner, or render it certain; as "two chesnut oaks, corner to Robert Young's survey of one hundred thousand acres, &c. the first, second, or third corner, &c." Such correction of course and distance cannot be made by a secret, undisclosed intention that the two chesnuts he called for should be those at one of Young's corners.

5. The course and distances called for in the grant will locate the grant on the waters and water courses, precisely as stated in the grant. This appears by the surveyor's diagram, which with the grant is record evidence of this fact. Let the courses and distances called for be varied according to Wilson's secret intention, the case will be very different:

The grant calls to be on part of Clover run, on Cheat river, and to include the waters of Pheasant run. These descriptions suit either mode of locating the grant; but the grant calls to be on the *waters of Tygart valley*, and to include *part of* the waters of Hornback's run and the cherry tree fork of Leading creek. Whereas, as he would locate his grant, it will include not only part of the waters of Hornback's run and the Cherry Tree fork of Leading creek, but *all* these two streams and their waters, and even all Leading creek itself, of which they are small branches; and his survey will be, not on the waters of Tygart valley river, but on the river itself, crossing it four times.

Mr Chief Justice MARSHALL delivered the opinion of the court.

The judgment in this cause was rendered by the court of the United States, for the western district of Virginia, in an ejectment brought by the defendants in error, to recover

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fifty thousand acres of land, a part of which was in the occupation of the defendants in the court below. The defendants in that court disclaimed as to the part of the land for which judgment was entered against the casual ejector, and went to trial as to the residue. The original plaintiffs having the eldest title, the case depended entirely on the question whether their grant covered the land in dispute. If it be surveyed according to the courses and distances called for, it will entirely exclude that land. The plaintiffs, however, claim to survey it in such manner as to comprehend the tenements in possession of the defendants.

A survey was made, and the diagram of the surveyor, with his report, exhibits the respective claims of the parties. The diagram A. B. C. D. E. F. A. represents the land claimed by the plaintiffs. A. B. C. D. G. H. A. represents the land, which, as the defendants contend, the grant to the plaintiffs ought to cover. A. B. C. and D. form the northern side of the tract, and are admitted by both parties to be correctly laid down. The question is whether the next line should run from D. to E. as contended by the plaintiffs, or from D. to G. as contended by the defendants. The line from D. to G. corresponds in course and distance with the call of the patent; it is S. nine W. four thousand six hundred poles. The line from D. to E. is S. twenty-eight degrees nine minutes west, four thousand eight hundred and fifty-four poles, varying nineteen degrees nine minutes from the course, and two hundred and fifty-four poles from the distance. This variance places the corner at E. about five miles west from that at G., and produces a correspondent change in the two remaining lines which form the southern and western sides of the land.

At the trial, the defendants demurred to the plaintiffs' testimony, and the jury found a verdict for the plaintiffs, subject to the opinion of the court on the demurrer. The court overruled the demurrer and gave judgment for the plaintiffs.

The demurrer states that at the trial the plaintiff gave in evidence the plat and report made by the surveyor, which show that the lines from A. to D. which bind the land on north, conform to the patent. That the other three lines D.

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E., E. F. and F. A. which inclose the land on the west, south, and east, are not marked, nor is any corner found at F. At E. two chesnut oaks were found where two chesnut oaks were called for in the patent. They are marked as a corner previously made for Robert Young. The lines D. G., G. H. and H. A. laid down by the directions of the defendants conformably to the patent, are not marked.

The plaintiffs also gave in evidence the patent under which they claimed; dated the 9th of July 1796, the conveyance of the patentees to them, and an official copy of the plat and certificate of survey on which the grant was founded. The land is described as lying on the waters of Tygart valley river, Cheat river, to include the waters of Pheasant run and a part of Clover run, part of the waters of Benjamin Hornback's and Cherry Tree fork of Leading creek. They also gave in evidence the grants under which the defendants claimed, with the entries and surveys on which they were founded, which were younger than that under which the plaintiffs claimed. They also read the deposition of William Wilson. He deposes that he made the survey of fifty thousand acres in 1795. He proves that he began at A. and ran the line on the north side of the tract to D. He then protracted a line intended to strike two chesnut oaks near the head of James's run by the side of a path leading from Tygart valley to the mouth of Seneca, which was a corner he had previously marked to a survey of one hundred thousand acres he had made for Robert Young. From those two chesnut oaks he ran to Tygart valley river. Not having a sufficient distance, and finding that the line would cross the river several times, he extended the course and called for a white oak, because he knew there were white oaks there about. He does not know whither the course and distance would have carried him to the east or west side of the river. He then protracted a line to the beginning. On being cross examined he said he made the line from D. to E. in his office, and laid it down, intending to hit the two chesnut oaks near James's run. He went to the two chesnut oaks and ran to the river (not quite half the line E. F.) where he stopped, and continued the line E. F. the proper distance, and also protracted the closing line F. A. He had no axe-

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man with him, consequently marked no trees. He was accompanied by only one individual, and does not allege that a chain was stretched.

The defendants in the district court having withdrawn their cause from the jury by a demurrer to evidence, or having submitted to a verdict for the plaintiffs subject to that demurrer, cannot hope for a judgment in their favour, if, by any fair construction of the evidence, the verdict can be sustained. If this cannot be done, the judgment rendered for the defendants in error must be reversed.

It is an obvious principle that a grant must describe the land to be conveyed, and that the subject granted must be identified by the description given of it in the instrument itself. For the purpose of furnishing this description and of separating the land from that which is not appropriated, the law directs a survey to be made by sworn officers, who, "at the time of making such survey, shall see the same bounded plainly by marked trees, except where a water course or ancient marked line shall be the boundary." The persons employed to carry the chain are to be sworn by the surveyor to measure justly and exactly to the best of their abilities. The description of the land thus made by a survey is transferred into the grant. It consists of the courses and distances ran by the surveyor, and of the marked trees at the lines and corners, or other natural objects which ascertain the very land which was actually surveyed. The courses and distances are less certain and less permanent guides to the land actually surveyed and granted, than natural and fixed objects on the ground; but they are guides to some extent, and, in the absence of all others, must govern us. If a grant be made which describes the land granted by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given us, and must be used.

In the case at bar the line from D. to E. or from D. to G. which forms the western boundary of the land intended to be granted, was never run or marked. In his office, the surveyor assumed a course and distance, and terminates the line at two small chesnut oaks. But where are we to look

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for these two small chesnut oaks in a wilderness in which one man takes up fifty thousand acres of land, and another one hundred thousand? Or how are we to distinguish them from other chesnut oaks? The guide and the only guide given us by the survey, or by the grant, is the course and distance. We are to find them at the end of a line of four thousand six hundred poles, to be run south nine degrees west from the established corner at D. We are furnished with no other guide which may conduct us to them. That the surveyor had in his mind the two small chesnut oaks which he had marked as a corner to Robert Young can be of no avail, since he has not indicated this intention on his survey. He has impliedly indicated the contrary. When the established line or corner of a prior survey is made part of a boundary, it is usual to designate such marked line or corner by naming the person whose line or corner it is. The call for two small chesnut oaks without farther description, would rather exclude the idea that they were already marked as the corner of a previous survey.

The fact that the surveyor on a subsequent day went to Young's corner, and without marking it as a corner for the survey he was then employed to make, walked along the line he intended for the southern boundary of the land nearly half the distance, without marking a single tree, cannot in any manner affect the case.

In estimating this evidence we may inquire what weight would be allowed to it if the grantee claimed to hold the land actually within his patent lines, and this testimony was opposed to him by a junior patentee within those lines? We believe that no person would hesitate an instant to say that his title to the land actually within the lines of his patent, was unquestionable. He cannot be permitted after the grant has issued to elect what ground it shall cover.

This opinion derives some additional weight from the general description of the country as made in the grant, and as shown on the plat and report of the survey made by order of court in the cause.

The grant calls to be on the waters of Tygart valley, and to include part of the waters of Hornback's run, and the

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Cherry Tree fork of Leading creek. This description accords with the survey as required by the plaintiffs in error. The grant, if placed as the defendants in error claim to place it, will include, as is shown by the survey made in the cause, not only part of the waters of Hornback's run and the Cherry Tree fork of Leading creek, but all these two streams, and even all Leading creek itself, of which they are small branches. It will also, instead of being on the waters of Tygart's valley river, lie on the river itself, which it crosses several times. The general description then contained in the grant, fits the land comprehended within the lines of the patent much better than it does that which is claimed by the defendants in error.

It is admitted that the course and distance called for in a grant may be controlled and corrected by other objects of description which show that the survey actually covered other ground than the line of the grant would comprehend. If the grant, in this case, had called for two small chesnut oaks marked as a corner to Robert Young's survey of one hundred thousand acres, the mistake in the course and distance would not have prevented the line from being run from the corner at D. to the chesnut oaks. So if a plain marked line, originally run from the one corner to the other, had shown that the land claimed was the land actually surveyed. But neither the grant nor the face of the plat furnishes any information by which the corner called for in the grant can be controlled. We are therefore of opinion that the defendant in error is not entitled to the land shown by the survey made in the cause to be in possession of the plaintiffs in error, and that the demurrer ought to have been sustained.

The judgment is reversed and the cause remanded with directions to enter judgment in favour of the defendants in the district court.

JOHN INGLIS, DEMANDANT vs. THE TRUSTEES OF THE SAILOR'S
SNUG HARBOUR IN THE CITY OF NEW YORK.

The testator gave all the rest and residue and remainder of his estate, real and personal, comprehending a large real estate in the city of New York, to the chancellor of the state of New York, and recorder of the city of New York, &c. (naming several other persons by their official description), to have and to hold the same unto them and their respective successors in office to the uses and trusts, subject to the conditions and appointments declared in the will; which were; out of the rents, issues and profits thereof, to erect and build upon the land upon which he resided, which was given by the will, an asylum, or marine hospital, to be called "the Sailor's Snug Harbour," for the purpose of maintaining and supporting aged, decrepid and worn out sailors, &c. And after giving directions as to the management of the fund by his trustees, and declaring that the institution created by his will should be perpetual, and that those officers and their successors should for ever continue the governors thereof, &c. he adds, "it is my will and desire that if it cannot legally be done according to my above intention, by them, without an act of the legislature, it is my will and desire that they will as soon as possible apply for an act of the legislature to incorporate them for the purpose above specified; and I do further declare it to be my will and intention, that the said rest, residue, &c. of my estate should at all events applied for the uses and purposes above set forth; and that it is my desire all courts of law and equity will so construe this my said last will as to have the said estate appropriated to the above uses, and that the same should in no case, for want of legal form or otherwise, be so construed as that my relations, or any other persons, should heir, possess or enjoy my property, except in the manner and for the uses herein above specified."

Within five years after the death of the testator, the legislature of the state of New York, on the application of the trustees, also named as executors of the will, passed a law constituting the persons holding the offices designated in the will, and their successors, a body corporate, by the name of "the Trustees of the Sailor's Snug Harbour," and enabling them to execute the trusts declared in the will.

This is a valid devise to divest the heir of his legal estate, or at all events to affect the lands in his hands with the trust declared in the will.

If, after such a plain and unequivocal declaration of the testator with respect to the disposition of his property, so cautiously guarding against and providing for every supposed difficulty that might arise, any technical objection shall now be interposed to defeat his purpose; it will form an exception to what we find so universally laid down in all our books as a cardinal rule in the construction of wills, that the intention of the testator is to be sought after and carried into effect. If this intention cannot be carried into effect precisely in the mode at first contemplated by him, consistently with the rules of law, he has provided an alternative, which with the aid of the act of the legislature must remove every difficulty. [118]

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In the case of "The Baptist Association *vs.* Hart's Executors," 4 Wheat. 27, the court considered the bequest void for uncertainty as to the devisees, and the property vested in the next of kin, or was disposed of by some other provisions of the will. If the testator in that case had bequeathed the property to the Baptist association, on its becoming thereafter and within a reasonable time incorporated, could there be a doubt but that the subsequent incorporation would have conferred on the association the capacity of taking and managing the fund? [114]

Whenever a person by will gives property, and points out the object, the property, and the way in which it shall go, a trust is created, unless he shows clearly, that his desire expressed, is to be controlled by the trustee, and that he shall have an option to defeat it. [119]

What are the rights of the individuals composing a society, and living under the protection of the government, when a revolution occurs, a dismemberment takes place, and when new governments are formed, and new relations between the government and the people are established. A person born in New York before the 4th of July 1776, and who remained an infant with his father in the city of New York, during the period it was occupied by the British troops; his father being a royalist, and having adhered to the British government, and left New York with the British troops, taking his son with him, who never returned to the United States, but afterwards became a bishop of the episcopal church in Nova Scotia; such a person was born a British subject, and continued an alien, and is disabled from taking land by inheritance in the state of New York. [126]

If such a person had been born after the 4th of July 1776, and before the 15th of September 1776, when the British troops took possession of the city of New York and the adjacent places, his infancy incapacitated him from making an election for himself, and his election and character followed that of his father; subject to the right of disaffirmance in a reasonable time after the termination of his minority; which never having been done, he remained a British subject, and disabled from inheriting land in the state of New York. [126]

The rule as to the point of time at which the American *ante nati* ceased to be British subjects differs in this country and in England, as established by the courts of justice in the respective countries. The English rule is to take the date of the treaty of peace in 1783. Our rule is to take the date of the declaration of independence. [121]

The settled doctrine in this country is, that a person born here, but who left the country before the declaration of independence, and never returned here, became an alien and incapable of taking lands subsequently by descent. The right to inherit depends upon the existing state of allegiance at the time of the descent cast. [121]

The doctrine of perpetual allegiance is not applied by the British courts to the American *ante nati*; and this court, in the case of *Blight's Lessee vs. Rochester*, 7 Wheat. 544, adopted the same rule with respect to the rights of British subjects here. That although born before the revolution, they are equally incapable with those born subsequent to that event of inheriting or transmitting the inheritance of lands in this country. [121]

The British doctrine therefore is, that the American *ante nati*, by remaining in America after the peace, lost their character of British subjects; and our doctrine is, that by withdrawing from this country, and adhering to the British

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government, they lost, or perhaps more properly speaking, never acquired the character of American citizens. [122]

The right of election must necessarily exist in all revolutions like ours, and is well established by adjudged cases. [122]

This court in the case of M'Ilvaine's Lessee *vs.* Coxe, 4 Cranch, 211, fully recognized the right of election; but they considered that Mr Coxe had lost that right by remaining in the state of New Jersey, not only after she had declared herself a sovereign state, but after she had passed laws by which she declared him to be a member of, and in allegiance to the new government. [124]

Allegiance may be dissolved by the mutual consent of the government and its citizens or subjects. The government may release the governed from their allegiance. This is even the British doctrine. [125]

C. B. by her last will and testament devised "all her estate, real and personal, wheresoever and whatsoever, in law or equity, in possession, reversion, remainder or expectancy, unto her executors and to the survivor of them, his heirs and assigns for ever," upon certain designated trusts: under the statute of wills of the state of New York, (1 N. Y. Revised Laws, 364,) all the rights of the testator to real estate, held adversely at the time of the decease of the testator, passed to the devisees by this will. [127]

It is the uniform rule of this court with respect to the title to real property, to apply the same rule which is applied in state tribunals in like cases. [127]

The right of an absent and absconding debtor to real estate held adversely, passed to and became vested in the trustee by the act of the legislature of New York passed April 4, 1786, entitled "an act for relief against absconding and absent debtors." [131]

In a writ of right the tenant may, on the mise joined, set up a title out of himself and in a third person. If any thing which fell from this court in the case of Greene *vs.* Liter, 8 Cranch, 229, can be supposed to give countenance to the opposite doctrine, it is done away by the explanation given by the court in Greene *vs.* Watkins, 7 Wheaton, 31. It is there laid down that the tenant may give in evidence the title in a third person for the purpose of disproving the defendant's *seisin*: that a writ of right does bring into controversy the mere right of the parties to the suit; and if so, it by consequence authorises either party to establish by evidence that the other has no right whatever in the demanded premises; or that his mere right is inferior to that set up against him. [133]

In a writ of right on the mise joined on the mere right, under a count for the entire right, a defendant may recover a less quantity than the entirety. [135]

THIS case came before the court at January term 1820, from the circuit court of the United States for the southern district of New York: on points of disagreement certified by the judges of that court. After argument by counsel, it was held under advisement until the present term.

It was a writ of right, brought in the circuit court, for the recovery of certain real estate situate in the city of New York, whereof Robert Richard Randall died seized and possessed.

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The count was upon the *seisin* of Robert Richard Randall, and went for the whole premises.

Paul R. Randall and Catherine Brewerton, a brother and sister of Robert Richard Randall, both survived him, but had since died, without issue.

The defendant claimed his relationship to Robert Richard Randall, through Margaret Inglis, his mother, who was a descendant of John Crooke, the common ancestor of Robert Richard Randall, Catherine Brewerton, and Paul R. Randall.

The tenants put themselves upon the grand assize, and the *mise* was joined upon the mere right.

The cause was tried at October term 1827.

The counsel for the tenants began with the evidence, and showed that they had been in possession for a number of years, claiming and holding the land as owners.

The *seisin* of Robert Richard Randall was then proved, and that he purchased from one baron Poelnitz. The genealogy of the defendant as next collateral heir of Robert R. Randall on the part of his mother, and that the blood of Thomas Randall, the father of Robert Richard Randall, was extinct, was proved.

It was in evidence that the British troops entered into New York on the 15th of September 1776, and took and had full possession thereof, and of the adjacent bays and islands, and established a civil government there under the authority of the British commander-in-chief.

Evidence was given to prove that the defendant was not more than one year old when the British troops entered the city of New York, where he was born; that the father of the defendant was a native of Ireland, and had resided for some time in New York, and continued to reside there until he left there for England, on the day of or the day before the evacuation of New York, the 25th of November 1783. He took the defendant with him to England, remained there two years, was appointed a bishop, and went to Nova Scotia in 1785 or 1786, and there resided until his death. The mother of the defendant died in New York on the 21st of September 1783, a little while before the evacuation thereof by the British troops. It was always considered by a witness

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who testified in the cause, that Charles Inglis, the father of the demandant, was a royalist. The demandant was certainly born before the year 1779; in 1783 he could not speak plainly, and was considered not more than five years old, between four and five. He took his degree of master of arts in England, was there ordained a clergyman; his place of residence from the time he first arrived at Nova Scotia was with his father, and he has continued to reside there ever since. He went to England to be consecrated a bishop; which character he now holds, being bishop of Nova Scotia. Charles Inglis, the father of the demandant, had four children, the eldest of which, a son, died an infant, 20th of January 1782, two daughters, and the demandant, who was the youngest child.

The following proceedings of a convention of the state of New York, before the British entered the city, were in evidence.

Tuesday Afternoon, July 16th, 1776.

Present, general Woodhull president, and the members of the convention.

Whereas, the present dangerous situation of this state demands the unremitting attention of every member of the convention: Resolved unanimously, that the consideration of the necessity and propriety of establishing an independent civil government be postponed until the first day of August next, and that in the meantime,

"Resolved unanimously, that all magistrates and other officers of justice in this state, who are well affected to the liberties of America, be requested, until further orders, to exercise their respective offices, provided, that all processes, and other their proceedings, be under the authority and in the name of the state of New York.

"Resolved unanimously, that all persons abiding within the state of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the state: and that all persons passing through, visiting, or making a temporary stay in said state, being entitled to the protection of the laws during the time of such

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passage, visitation, or temporary stay, owe, during the same, allegiance thereto.

"That all persons, members of or owing allegiance to this state, as before described, who shall levy war against the said state, within the same, or be adherent to the king of Great Britain, or others, the enemies of the said state, within the same, giving to him or them aid or comfort, are guilty of treason against the state, and being thereof convicted, shall suffer the pains and penalties of death."

The tenants gave in evidence the acts of the legislature of New York: "For the forfeiture of the estates of persons who adhered to the enemies of the state," &c. passed the 22d of October 1779; the "act supplementary to the act to provide for the temporary government of the southern part of this state," &c. passed the 23d of October 1779; and the supplement thereto, passed the 27th of March 1783.

Robert Richard Randall died in the city of New York between the 1st of June and the 1st of July 1801, having on the 1st of June of that year made his last will and testament; probate of which was regularly made in the city of New York.

The provisions of the will of Robert Richard Randall under which the tenants claimed their title are the following.

"6. As to and concerning all the rest, residue and remainder of my estate, both real and personal; I give, devise and bequeath the same unto the chancellor of the state of New York, the mayor and recorder of the city of New York, the president of the chamber of commerce in the city of New York, the president and vice president of the marine society of the city of New York, the senior minister of the episcopal church in the said city, and the senior minister of the presbyterian church in the said city, to have and to hold all and singular the said rest, residue, and remainder of my said real and personal estate, unto them the said chancellor of the state of New York, mayor of the city of New York, the recorder of the city of New York, the president of the chamber of commerce, president and vice president of the marine society, senior minister of the episcopal church, and

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senior minister of the presbyterian church in the said city, for the time being, and their respective successors in the said offices forever; to, for, and upon the uses, trusts, intents and purposes, and subject to the directions and appointments hereinafter mentioned and declared concerning the same, that is to say, out of the rents, issues and profits of the said rest, residue, and remainder of my said real and personal estate, to erect and build upon some eligible part of the land upon which I now reside, an asylum, or marine hospital, to be called "the Sailor's Snug Harbour," for the purpose of maintaining and supporting aged, decrepid, and worn out sailors, as soon as they, my said charity trustees, or a majority of them, shall judge the proceeds of the said estate will support fifty of the said sailors, and upwards; and I do hereby direct, that the income of the said real and personal estate, given as aforesaid to my said charity trustees, shall forever hereafter be used and applied for supporting the asylum, or marine hospital, hereby directed to be built, and for maintaining sailors of the above description therein, in such manner as the said trustees, or a majority of them, may from time, or their successors in office, may from time to time direct. And it is my intention that the institution hereby directed and created should be perpetual, and that the above mentioned officers for the time being, and their successors, should forever continue and be the governors thereof, and have the superintendence of the same. And it is my will and desire, that if it cannot legally be done, according to my above intention, by them, without an act of the legislature, it is my will and desire that they will as soon as possible apply for an act of the legislature to incorporate them for the purposes above specified. And I do further declare it to be my will and intention, that the said rest, residue and remainder of my real and personal estate, should be at all events applied for the uses and purposes above set forth; and that it is my desire all courts of law and equity will so construe this my said will, as to have the said estate appropriated to the above uses, and that the same should in no case, for want of legal form or otherwise, be so construed as that my relations, or any other persons,

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should heir, possess, or enjoy my property, except in the manner and for the uses herein above specified.

"And, lastly, I do nominate and appoint the chancellor of the state of New York, for the time being, at the time of my decease; the mayor of the city of New York, for the time being; the recorder of the city of New York, for the time being; the president of the chamber of commerce, for the time being; the president and vice-president of the marine society in the city of New York, for the time being; the senior minister of the episcopal church in the city of New York, and the senior minister of the presbyterian church in the said city, for the time being; and their successors in office after them, to be the executors of this my last will and testament, hereby revoking all former and other wills, and declaring this to be my last will and testament."

It was admitted, that at the time of the decease of Robert Richard Randall, and of the probate of the will, the offices named in the will were respectively filled by different persons, and that they, or some of them, immediately upon the death of the testator, entered upon the premises under the will, claiming to be the owners in fee, until the legislature of New York, on their application, on the 6th of February 1806, passed "an act to incorporate the trustees of the marine hospital, called the Sailor's Snug Harbour, in the city of New York."

Those offices continued to be filled respectively by different persons, from the time of the death of the testator until the time of the trial.

The act incorporating "the trustees of the marine hospital," &c. provides,

Whereas, it is represented to the legislature, that Robert Richard Randall, late of the city of New York, deceased, in and by his last will and testament, duly made and executed, bearing date the 1st day of June, in the year of our Lord 1801, did, after bequeathing certain specific legacies therein mentioned, among other things give and devise and bequeath all the residue of his estate, both real and personal, unto the chancellor of this state, the mayor and recorder of the city of New York, the president of the chamber of com-

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merce in the city of New York, the president and vice president of the marine society of the city of New York, the senior minister of the episcopal church in the said city, and the senior minister of the presbyterian church in the said city, for the time being, and to their successors in office respectively, in trust, to receive the rents, issues and profits thereof, and to apply the same to the erecting or building on some eligible part of the land whereon the testator then resided, an asylum, or marine hospital, to be called "the Sailor's Snug Harbour," for the purpose of maintaining and supporting aged, decrepid and worn out sailors, as soon as the said trustees, or a majority of them, should judge the proceeds of the said estate would support fifty of such sailors and upwards; and that the said testator, in his said will, declared his intention to be, that the said estate should at all events be applied to the purposes aforesaid, and no other; and if his said intent could not be carried into effect without an act of incorporation, he therein expressed his desire that the said trustees would apply to the legislature for such incorporation; and, whereas, the said trustees have represented that the said estate is of considerable value, and if prudently managed, will in time enable them to erect such hospital, and carry into effect the intent of the testator; but that as such trustees, and being also appointed executors of the said will, in virtue of their offices, and only during their continuance in the said offices, they have found that considerable inconveniences have arisen in the management of the said estate, from the changes which have taken place in the ordinary course of the elections and appointments to those offices, and have prayed to be incorporated for the purposes expressed in the said will, and such prayer appears to be reasonable: therefore,

1. Be it enacted by the people of the state of New York, represented in senate and assembly, that John Lansing, Jun. the chancellor of this state, De Witt Clinton the mayor, and Maturin Livingston the recorder of the city of New York, John Murray the president of the chamber of commerce of the city of New York, James Farquhar the president, and Thomas Farmer the first vice president of the marine so-

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society of the city of New York, Benjamin Moore, senior minister of the episcopal church in the said city; and John Rogers, senior minister of the presbyterian church in the said city, and their successors in office respectively, in virtue of their said offices ; shall be, and hereby are constituted and declared to be a body corporate, in fact, and in name, by the name and style of the trustees of the Sailor's Snug Harbour in the city of New York ; and by that name they and their successors shall have continual succession, and shall be capable in law of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, and in all manner of actions, suits, complaints, matters and causes whatsoever ; and that they and their successors may have a common seal, and may change and alter the same at their pleasure ; and also, that they and their successors, by the name and style aforesaid, shall be capable in law of holding and disposing of the said real and personal estate, devised and bequeathed as aforesaid, according to the intention of the said will ; and the same is hereby declared to be vested in them, and their successors in office, for the purpose therein expressed ; and shall also be capable of purchasing, holding and conveying any other real and personal estate, for the use and benefit of the said corporation, in such manner as to them, or a majority of them, shall appear to be most conducive to the interest of the said institution.

The second section gives to the trustees the power to make rules and regulations, and to appoint officers for the government and business of the corporation, and provides for the mode of transacting the same.

The third section declares that "this act shall be deemed and taken to be a public act, and be construed in all courts and places, benignly and favourably, for the purposes therein intended."

On the 25th of March 1814, an act supplementary to the act of incorporation was passed, declaring, that persons holding certain offices should act as trustees, and declaring it to be the duty of the corporation to make an annual report of

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their funds to the common council of the city, of the state of their funds.

The counsel for the tenants gave in evidence the act of the legislature of New York, "for relief against absconding and absent debtors," passed the 4th of April 1786; and a report made to the superior court of judicature of the state of New York, of proceedings under the act against Paul Richard Randall, by which he was declared an absent debtor.

Under this act all the estate, real as well as personal, of Paul Richard Randall, as an absent debtor, of what kind or nature soever the same might be, were, on the 13th of November 1800, attached, seized, and taken, and were, by the recorder of New York, under and in pursuance of the provisions of the law, upon the 22d of December 1801, by an instrument of writing under his hand and seal, conveyed to Charles Ludlow, James Brewerton, and Roger Strong, all of the city of New York; to be trustees for all the creditors of the said Paul Richard Randall, who afterwards duly qualified as trustees.

Subsequently, on the 14th of April 1808, upon a further application to the recorder of New York, Paul Richard Randall being still absent, other trustees are appointed, according to law, who were, on the same day, qualified to act as trustees.

The defendant gave in evidence the following rules of the supreme court of judicature of the people of the state of New York:

February 17th, 1804.

"In the matter of Paul Richard Randall, an absent debtor.

"On reading and filing the petition of Alexander Stewart, White Matlack, and Catherine Brewerton, agents and attorneys of the said Paul Richard Randall, and also reading and filing the answer of Charles Ludlow, James Brewerton, and Roger Strong, trustees for all the creditors of the said Paul Richard Randall, to the said petition, and on motion of Mr Hamilton, attorney of the said Alexander Stewart, White Matlack, and Catherine Brewerton, it is ordered by the court, that the said trustees pay to the said Paul Richard Randall,

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or to his said agents and attorneys, for his use, the sum of five thousand five hundred dollars, out of the moneys now remaining in the hands of the said trustees."

August 9th, 1804.

"In the matter of Paul R. Randall, an absent debtor, and his assignees, &c.

"On reading and filing the petition of Alexander Phoenix, the attorney and agent for Paul Richard Randall, together with a certified copy of the power of attorney, and the acknowledgements of the trustees and former attorneys of the said Paul, thereunto annexed, and on motion of Mr Van Wyck, of counsel for the said Alexander, ordered that the rule heretofore, in February term last, made in the said matter, be vacated, and that the said sum of five thousand five hundred dollars, acknowledged to be still remaining in the hands of the said Charles Ludlow, James Brewerton, and Roger Strong, trustees as aforesaid, be paid over by them to the said Alexander Phoenix, as the attorney and agent of the said Paul Richard Randall."

It appeared in evidence, that Catherine Brewerton died some time in or about the year of our Lord 1815, and that Paul R. Randall died some time in the year of our Lord 1820, Catherine Brewerton, having first, while a widow, made her last will and testament, dated the 5th of June A. D. 1815, duly executed and attested to pass real estate, and devised among other things as follows, that is to say:

"Secondly, I give, devise and bequeath, all my estate, real and personal, whatsoever and wheresoever, in law or equity, in possession, reversion, remainder or expectancy, (excepting such as is herein otherwise specially mentioned) unto my executors hereinafter named, and to the survivor of them, his heirs and assigns for ever, upon trust nevertheless for the uses and purposes hereinafter mentioned and intended, that is to say, that my executors shall," &c.

Upon the trial of the cause in the circuit court the judges were opposed in opinion upon the following points, which were certified to the court.

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I. Whether, inasmuch as the count in the cause is for the entire right in the premises, the defendant can recover a less quantity than the entirety.

II. Whether John Inglis, the defendant, was or was not capable of taking lands in the state of New York by descent, which general question presents itself under the following aspects :

1. Whether, in case he was born before the 4th of July 1776, he is an alien, and disabled from taking real estate by inheritance.

2. Whether, in case he was born after the 4th of July 1776, and before the 15th of September of the same year, when the British took possession of New York, he would be under the like disability.

3. Whether, if he was born after the British took possession of New York, and before the evacuation on the 25th of November 1783, he would be under the like disability.

4. What would be the effect upon the right of John Inglis to inherit real estate in New York, if the grand assize should find that Charles Inglis, the father, and John Inglis, the defendant, did, in point of fact, elect to become and continue British subjects and not American citizens ?

III. Whether the will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question, so as to defeat the defendant in any respect ; the premises being, at the date of the will and ever since, held adversely by the tenants in this suit.

IV. Whether the proceedings against Paul R. Randall, as an absent debtor, passed his right or interest in the lands in question to, and vested the same in the trustees appointed under the said proceedings, or either of them, so as to defeat the defendant in any respect.

V. Whether the devise in the will of Robert Richard Randall of the lands in question is a valid devise, so as to divest the heir at law of his legal estate, or to affect the lands in his hands with a trust.

The cause was argued by Mr Ogden and Mr Webster, for the defendant, and by Mr Talcott and Mr Wirt, for the

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tenants. The argument was commenced and concluded by the counsel for the tenants.

Mr Justice THOMPSON delivered the opinion of the court.

This case comes up from the circuit court for the southern district of New York, upon several points, on a division of opinion certified by that court. In the examination of these points, I shall pursue the order in which they have been discussed at the bar.

I. "Whether the devise in the will of Robert Richard Randall, of the lands in question, is a valid devise, so as to divest the heir at law of his legal estate, or to affect the lands in his hands with a trust."

This question arises upon the residuary clause in the will; in which the testator declares: that as to and concerning all the rest, residue, and remainder of my estate, both real and personal, I give, devise and bequeath the same unto the chancellor of the state of New York, the mayor and recorder of the city of New York, &c. (naming several other persons by their official description only) to have and to hold all and singular the said rest, residue and remainder of my said real and personal estate, unto them, and their respective successors in office, for ever, to, for and upon, the uses, trusts, intents and purposes, and subject to the directions and appointments hereinafter mentioned and declared concerning the same, that is to say: out of the rents, issues and profits of the said rest, residue and remainder of my said real and personal estate, to erect and build upon some eligible part of the land upon which I now reside, an asylum, or marine hospital, to be called "the Sailor's Snug Harbour," for the purpose of supporting aged, decrepid, and worn-out sailors, &c. And after giving directions as to the management of the fund by his trustees, and declaring that it is his intention, that the institution erected by his will should be perpetual, and that the above mentioned officers for the time being, and their successors, should forever continue to be the governors thereof, and have the superintendence of the same, he then adds, "and it is my will and desire, that if it cannot legally be done, according to my above intention, by them,

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without an act of the legislature, it is my will and desire, that they will as soon as possible apply for an act of the legislature to incorporate them for the purposes above specified. And I do hereby declare it to be my will and intention, that the said rest, residue and remainder of my said real and personal estate, should be at all events applied for the uses and purposes above set forth; and that it is my desire all courts of law and equity will so construe this my said will as to have the said estate appropriated to the above uses, and that the same should in no case, for want of legal form or otherwise, be so construed as that my relations, or any other persons, should heir, possess or enjoy my property, except in the manner, and for the uses herein above specified."

The legislature of the state of New York, within a few years after the death of the testator, on the application of the trustees, who are also named as executors in the will, passed a law, constituting the persons holding the offices designated in the will, and their successors in office, a body corporate, by the name and style of "the Trustees of the Sailor's Snug Harbour in the city of New York," and declaring that they and their successors, by the name and style aforesaid, shall be capable in law of holding and disposing of the said real and personal estate, devised and bequeathed as aforesaid, according to the intentions of the aforesaid will. And that the same is hereby declared to be vested in them and their successors in office for the purposes therein expressed.

If, after such a plain and unequivocal declaration of the testator with respect to the disposition of his property, so cautiously guarding against, and providing for every supposed difficulty that might arise, any technical objection shall now be interposed to defeat his purpose, it will form an exception to what we find so universally laid down in all our books, as a cardinal rule in the construction of wills, that the intention of the testator is to be sought after and carried into effect. But no such difficulty in my judgment is here presented. If the intention of the testator cannot be carried into effect, precisely in the mode at first contemplated by

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him, consistently with the rules of law, he has provided an alternative, which, with the aid of the act of the legislature, must remove all difficulty.

The case of the Baptist Association *vs.* Hart's executors, 4 Wheat. 27, is supposed to have a strong bearing upon the present. This is however distinguishable in many important particulars from that. The bequest there was, "*to the Baptist Association that for ordinary meets at Philadelphia.*" This association not being incorporated, was considered incapable of taking the trust as a society. It was a devise in presenti, to take effect immediately on the death of the testator, and the individuals composing it were numerous and uncertain, and there was no executory bequest over to the association if it should become incorporated. The court therefore considered the bequest gone for uncertainty as to the devisees; and the property vested in the next of kin, or was disposed of by some other provision in the will. If the testator in that case had bequeathed the property to the Baptist Association on its becoming thereafter, and within a reasonable time incorporated, could there be a doubt but that the subsequent incorporation would have conferred on the association the capacity of taking and managing the fund.

In the case now before the court, there is no uncertainty with respect to the individuals who were to execute the trust. The designation of the trustees by their official character, is equivalent to naming them by their proper names. Each office referred to was filled by a single individual, and the naming of them by their official distinction was a mere designation personæ. They are appointed executors by the same description, and no objection could lie to their qualifying and acting as such. The trust was not to be executed by them in their official characters, but in their private and individual capacities. But admitting that if the devise in the present case had been to the officers named in the will and their successors, to execute the trust, and no other contingent provision made, it would fall within the case of the Baptist Association *vs.* Hart's executors.

The subsequent provisions in the will must remove all difficulty on this ground. If the first mode pointed out by the testator for carrying into execution his will and inten-

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tion, with respect to this fund, cannot legally take effect, it must be rejected, and the will stand as if it had never been inserted ; and the devise would then be to a corporation, to be created by the legislature, composed of the several officers designated in the will as trustees, to take the estate and execute the trust.

And what objection can there be to this as a valid executory devise, which is such a disposition of lands, that thereby no estate vests at the death of the devisor, but only on some future contingency ? By an executory devise, a freehold may be made to commence in futuro, and needs no particular estates to support it. The future estate is to arise upon some specified contingency, and the fee simple is left to descend to the heir at law until such contingency happens. A common case put in the books to illustrate the rule is : if one devises land to a feme sole and her heirs upon her marriage. This would be a freehold commencing in futuro, without any particular estate to support it, and would be void in a deed, though good by executory devise, 2 Black. Com. 175. This contingency must happen within a reasonable time, and the utmost length of time the law allows for this is, that of a life or lives in being and twenty-one years afterwards. The devise in this case does not purport to be a present devise to a corporation not in being, but a devise to take effect in futuro upon the corporation being created. The contingency was not too remote. The incorporation was to be procured, according to the directions in the will, as soon as possible, on its being ascertained that the trust could not legally be carried into effect in the mode first designated by the testator. It is a devise to take effect upon condition that the legislature should pass a law incorporating the trustees named in the will. Every executory devise is upon some condition or contingency, and takes effect only upon the happening of such contingency or the performance of such condition. As in the case put of a devise to a feme sole upon her marriage. The devise depends on the condition of her afterwards marrying.

The doctrine sanctioned by the court in Porter's case, 1 Coke's Rep. 24, admits the validity of a devise to a future in-

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corporation. In answer to the argument that the devise of a charitable use was void under the statute 23 Hen. 8, it was said, that admitting this, yet the condition was not void in that case. For the testator devised that his wife shall have his lands and tenements, upon condition that she, by the advice of learned counsel, in convenient time after his death, shall assure all his lands and tenements for the maintenance and continuance of the said free school, and alms men and alms women for ever. So that although the said uses were prohibited by the statute, yet the testator hath devised, that counsel learned should advise, how the said lands and tenements should be assured, for the uses aforesaid, and that may be advised lawfully: viz. To make a corporation of them by the king's letters patent, and afterwards, by license, to assure the lands and tenements to them. So if a man devise that his executors shall, by the advice of learned counsel, convey his lands to any corporation, spiritual or temporal, this is not against any act of parliament, because it may lawfully be done by license, &c. and so doubtless was the intent of the testator, for he would have the lands assured for the maintenance of the free school, and poor, for ever, which cannot be done without incorporation and license, as aforesaid; so the condition is not against law: *quod fuit concessum per curiam.*

The devise in that case could ~~not~~ take effect without the incorporation. This was the condition upon which its validity depended. And the incorporation was to be procured after the death of the testator. The devise then, as also in the case now before the court, does not purport to be a present devise, but to take effect upon some future event. And this distinguishes the present case from that of the Baptist Association *vs.* Hart's executors, in another important circumstance. There it was a present devise, here it is a future devise. A devise to the first son of A. he having no son at that time, is void; because it is by way of a present devise, and the devisee is not *in esse*. But a devise to the first son of A. when he shall have one, is good; for that is only a future devise, and valid as an executory devise. 1 Salk. 226, 229.

The cases in the books are very strong to show, that for the purpose of carrying into effect the intention of the tes-

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tator, any mode pointed out by him will be sanctioned, if consistent with the rules of law, although some may fail. In *Thellusson vs. Woodford*, 4 Ves. Jun. 325, Buller, Justice, sitting with the lord chancellor, refers to, and adopts with approbation, the rule laid down by lord Talbot in *Hopkins vs. Hopkins*: that in such cases, (on wills,) the method of the courts is not to set aside the intent because it cannot take effect so fully as the testator desired, but to let it work as far as it can. Most executory devises, he says, are without any freehold to support them; the number of contingencies is not material, if they are to happen within the limits allowed by law. That it was never held that executory devises are to be governed by the rules of law, as to common law conveyances. The only question is, whether the contingencies are to happen within a reasonable time or not. The master of the rolls in that case says, (p. 329,) he knows of only one general rule of construction, equally for courts of equity and courts of law, applicable to wills. The intention of the testator is to be sought for, and the will carried into effect, provided it can be done consistent with the rules of law. And he adds another rule, which has become an established rule of construction. That if the court can see a general intention, consistent with the rules of law, but the testator has attempted to carry it into effect in a way that is not permitted, the court is to give effect to the general intention, though the particular mode shall fail. 1 Peere Wms, 332. 2 Brown's Ch. 51.

The language of Lord Mansfield in the case of *Chapman vs. Brown*, 3 Burr. 1634, is very strong to show how far courts will go to carry into effect the intention of the testator. To attain the intent, he says, words of limitation shall operate as words of purchase; implication shall supply verbal omissions. The letter shall give way, every inaccuracy of grammar, every impropriety of terms, shall be corrected by the general meaning, if that be clear and manifest.

In *Bartlet vs. King*, 12 Mass. Rep. 543, the supreme judicial court of Massachusetts adopt the rule laid down in *Thellusson vs. Woodford*, that the court is bound to carry the will into effect if they can see a general intention con-

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sistent with the rules of law, even if the particular mode or manner pointed out by the testator is illegal. And the court refer with approbation to what is laid down by Powell in his Treatise on Devises, 421, that a devise is never construed absolutely void for uncertainty, but from necessity: if it be possible to reduce it to certainty it is good. So also in *Finlay vs. Riddle*, 3 Binn. Rep. 162, in the supreme court of Pennsylvania, the rule is recognized, that the general intent must be carried into effect, even if it is at the expense of the particular intent.

A rule so reasonable and just in itself, and in such perfect harmony with the whole doctrine of the law in relation to the construction of wills, cannot but receive the approbation and sanction of all courts of justice; and a stronger case calling for the application of that rule can scarcely be imagined than the one now before the court. The general intent of the testator, that this fund should be applied to the maintenance and support of aged, decrepid and worn out sailors, cannot be mistaken. And he seems to have anticipated that some difficulty might arise, about its being legally done in the particular mode pointed out by him. And to guard against a failure of his purpose on that account, he directs application to be made to the legislature for an incorporation, to take and execute the trust according to his will; declaring his will and intention to be, that his estate should at all events be applied to the uses and purposes aforesaid; and desiring all courts of law and equity so to construe his will, as to have his estate applied to such uses. And to make it still more secure; if possible, he finally directs that his will should in no case, for want of legal form or otherwise, be so construed, as that his relations, or any other persons, should heir, possess or enjoy his property, except in the manner and for the uses specified in his will.

The will looks therefore to three alternatives:

1. That the officers named in the will as trustees, should take the estate and execute the trust.
2. If that could not legally be done, then he directs his trustees to procure an act of incorporation, and vests the estate in it for the purpose of executing the trust.

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3. If both these should fail, his heirs, or whosoever should possess and enjoy the property, are charged with the trust:

That this trust is fastened upon the land cannot admit of a doubt. Wherever a person by will gives property, and points out the object, the property, and the way in which it shall go, a trust is created; unless he shows clearly, that his desire expressed is to be controlled by the trustees, and that he shall have an option to defeat it. 2 Ves. Jun. 335.

It has been urged by the defendant's counsel, that these lands cannot be charged with the trust in the hands of the heir, because the will directs that they shall not be possessed or enjoyed, except in the *manner* and for the *uses* specified. That the *manner* and the *use* must concur in order to charge the trust on the land. But I apprehend this is a mistaken application of the term *manner*, as here used. It does not refer to the persons who were to execute the trust. But to the mode or manner in which it was to be carried into effect, viz. by erecting upon some eligible part of the land an asylum, or marine hospital, to be called the Sailor's Snug Harbour. And the *uses* were, "for the purpose of maintaining and supporting aged, decrepid and worn out sailors." Whoever therefore takes the land, takes it charged with these *uses* or trusts, which are to be executed in the manner above mentioned. And if so, there can be no objection to the act of incorporation, and the vesting the title therein declared. It does not interfere with any vested rights in the heir. He has no beneficial interest in the land. And the law only transfers the execution of the trust from him to the corporation, and thereby carrying into effect the clear and manifest intention of the testator. But being of opinion that the legal estate passed under the will, I have not deemed it necessary to pursue the question of trust, and have simply referred to it, as being embraced in the point submitted to this court.

If this is to be considered a devise to a corporation, it will not come within the prohibitions in the statute of wills, 1 Revised Laws, 364. For this act of incorporation is, *pro tanto*, a repeal of that statute.

Taking this devise therefore in either of the points of view

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in which it has been considered, the answer to the question put must be, that it is valid, so as to divest the heir of his legal estate, or at all events, to affect the lands in his hands with the trust declared in the will.

If this view of the devise in the will of Robert Richard Randall be correct, it puts an end to the right and claim of the demandant, and might render it unnecessary to examine the other points which have been certified to this court, had the questions come up on a special verdict or bill of exceptions. But coming up on a certificate of a division of opinion, it has been the usual course of this court to express an opinion upon all the points.

It is not however deemed necessary to go into a very extended examination of the other questions, as the opinion of the court upon the one already considered, is conclusive against the right of recovery in this action.

II. The second general question is, whether John Inglis, the demandant, was or was not capable of taking lands in the state of New York by descent.

This question is presented under several aspects, for the purpose of meeting what at present from the evidence appears a little uncertain, as to the time of the birth of John Inglis. This question as here presented, does not call upon the court for an opinion upon the broad doctrine of allegiance and the right of expatriation, under a settled and unchanged state of society and government. But to decide what are the rights of the individuals composing that society, and living under the protection of that government, when a revolution occurs; a dismemberment takes place; new governments are formed; and new relations between the government and the people are established.

If John Inglis, according to the first supposition under this point, was born before the 4th of July 1776, he is an alien; unless his remaining in New York during the war changed his character and made him an American citizen. It is universally admitted, both in the English courts and in those of our own country, that all persons born within the colonies of North America, whilst subject to the crown of Great Britain, were natural born British subjects, and it

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must necessarily follow, that that character was changed by the separation of the colonies from the parent state, and the acknowledgement of their independence.

The rule as to the point of time at which the American *ante nati* ceased to be British subjects, differs in this country and in England, as established by the courts of justice in the respective countries. The English rule is to take the date of the treaty of peace in 1783. Our rule is to take the date of the declaration of independence. And in the application of the rule to different cases, some difference in opinion may arise. The settled doctrine of this country is, that a person born here, who left the country before the declaration of independence, and never returned here, became thereby an alien, and incapable of taking lands subsequently by descent in this country. The right to inherit depends upon the existing state of allegiance at the time of descent cast. The descent cast in this case being long after the treaty of peace, the difficulty which has arisen in some cases, where the title was acquired between the declaration of independence and the treaty of peace, does not arise here. *Prima facie*, and as a general rule; the character in which the American *ante nati* are to be considered, will depend upon, and be determined by the situation of the party and the election made at the date of the declaration of independence, according to our rule; or the treaty of peace according to the British rule. But this general rule must necessarily be controlled by special circumstances attending particular cases. And if the right of election is at all admitted, it must be determined, in most cases, by what took place during the struggle, and between the declaration of independence and the treaty of peace. To say that the election must have been made before, or immediately at the declaration of independence, would render the right nugatory.

The doctrine of perpetual allegiance is not applied by the British courts to the American *ante nati*. This is fully shown by the late case of *Doe vs. Acklam*, 2 Barn. & Cresw. 779. Chief Justice Abbott says, "James Ludlow, the father of Frances May, the lessor of the plaintiff, was undoubtedly born a subject of Great Britain. He was born in a part of

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America which was at the time of his birth a British colony, and parcel of the dominions of the crown of Great Britain; but upon the fact found, we are of opinion that he was not a subject of the crown of Great Britain at the time of the birth of his daughter. She was born after the independence of the colonies was recognised by the crown of Great Britain, after the colonies had become United States, and their inhabitants generally citizens of those states. And her father by his continued residence in those states manifestly became a citizen of them." He considered the treaty of peace as a release, from their allegiance, of all British subjects who remained there. A declaration, says he, that a state shall be free, sovereign and independent, is a declaration, that the people composing the state shall no longer be considered as subjects of the sovereign by whom such a declaration is made. And this court, in the case of *Blight's Lessee vs. Rochester*, 7 Wheat. 544, adopted the same rule with respect to the right of British subjects here. That although born before the revolution, they are equally incapable with those born subsequent to that event of inheriting or transmitting the inheritance of lands in this country. The British doctrine therefore is, that the American *ante nati*, by remaining in America after the treaty of peace, lost their character of British subjects. And our doctrine is, that by withdrawing from this country, and adhering to the British government they lost, or, perhaps more properly speaking, never acquired the character of American citizens.

This right of election must necessarily exist, in all revolutions like ours, and is so well established by adjudged cases, that it is entirely unnecessary to enter into an examination of the authorities. The only difficulty that can arise is, to determine the time when the election should have been made. Vattel, B. 1, ch. 3, sec. 33. 1 Dall. 58. 2 Dall. 234. 20 Johns. 332. 2 Mass. 179, 236, 244, note. 2 Pickering, 394. 2 Kent's Com. 49.

I am not aware of any case in the American courts where this right of election has been denied, except that of *Ainsley vs. Martin*, 9 Mass. 454. Chief Justice Parsons does there seem to recognise, and apply the doctrine of perpetual alle-

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giance, in its fullest extent. He then declares that a person born in Massachusetts, and who, before the 4th of July 1776, withdrew into the British dominions, and never since returned into the United States, was not an alien, that his allegiance to the king of Great Britain was founded on his birth, within his dominions, and that that allegiance accrued to the commonwealth of Massachusetts, as his lawful successor. But he adds what may take the present case even out of his rule: "It not being alleged," says he, "that the defendant has been expatriated, by virtue of any statute or any judgment of law." But the doctrine laid down in this case is certainly not that which prevailed in the supreme judicial court of Massachusetts, both before and since that decision, as will appear by the cases above referred to of *Gardner vs. Ward*, and *Kilham vs. Ward*, 2 Mass. and of *George Phipps*, 2 Pickering, 394, note.

John Inglis, if born before the declaration of independence, must have been very young at that time, and incapable of making an election for himself; but he must, after such a lapse of time, be taken to have adopted and ratified the choice made for him by his father, and still to retain the character of a British subject, and never to have become an American citizen, if his father was so to be considered. He was taken from this country by his father before the treaty of peace, and has continued ever since to reside within the British dominions without signifying any dissent to the election made for him; and this ratification, as to all his rights, must relate back, and have the same effect and operation, as if the election had been made by himself at that time.

How then is his father Charles Inglis to be considered? Was he an American citizen? He was here at the time of the declaration of independence, and *prima facie* may be deemed to have become thereby an American citizen. But this *prima facie* presumption may be rebutted; otherwise there is no force or meaning in the right of election. It surely cannot be said, that nothing short of actually removing from the country before the declaration of independence will be received as evidence of the election; and every act that could be done to signify the choice that had been made,

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except actually withdrawing from the country, was done by Charles Inglis. He resided in the city of New York at the declaration of independence, and remained there until he removed to England, a short time before the evacuation of the city by the British in November 1783; New York during the whole of that time, except from July to September 1776, being in possession, and under the government and control of the British, he taking a part and acting with the British; and was, according to the strong language of the witness, as much a royalist as he himself was, and that no man could be more so. Was Charles Inglis under these circumstances to be considered an American citizen? If being here at the declaration of independence necessarily made him such, under all possible circumstances he was an American citizen. But I apprehend this would be carrying the rule to an extent that never can be sanctioned in a court of justice, and would certainly be going beyond any case as yet decided.

The facts disclosed in this case, then, lead irresistibly to the conclusion that it was the fixed determination of Charles Inglis the father, at the declaration of independence, to adhere to his native allegiance. And John Inglis the son must be deemed to have followed the condition of his father, and the character of a British subject attached to and fastened on him also, which he has never attempted to throw off by any act disaffirming the choice made for him by his father.

The case of *M'Illvaine vs. Coxe's Lessee*, 4 Cranch, 211, which has been relied upon, will not reach this case. The court in that case recognized fully the right of election, but considered that Mr Coxe had lost that right by remaining in the state of New Jersey, not only after she had declared herself a sovereign state, but after she had passed laws by which she pronounced him to be a member of, and in allegiance to the new government; that by the act of the 4th of October 1776 he became a member of the new society, entitled to the protection of its government. He continued to reside in New Jersey after the passage of this law, and until some time in the year 1777, thereby making his election to become a member of the new government; and the doctrine of allegiance became applicable to his case, which rests on the

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ground of a mutual compact between the government and the citizen or subject, which it is said cannot be dissolved by either party without the concurrence of the other. It is the tie which binds the governed to their government, in return for the protection which the government affords them. New Jersey, in October 1776, was in a condition to extend that protection, which Coxe tacitly accepted by remaining there. But that was not the situation of the city of New York; it was in the possession of the British. The government of the state of New York did not extend to it in point of fact.

The resolutions of the convention of New York of the 16th of July 1776, have been relied upon as asserting a claim to the allegiance of all persons residing within the state. But it may well be doubted whether these resolutions reached the case of Charles Inglis. The language is, "that all persons abiding within the state of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the state." Charles Inglis was not, within the reasonable interpretation of this resolution, abiding in the state and owing protection to the laws of the same. He was within the British lines, and under the protection of the British army, manifesting a full determination to continue a British subject. But if it should be admitted that the state of New York had a right to claim the allegiance of Charles Inglis, and did assert that right by the resolution referred to, still the case of *M'Ilvaine vs. Coxe* does not apply.

It cannot, I presume, be denied, but that allegiance may be dissolved by the mutual consent of the government and its citizens or subjects. The government may release the governed from their allegiance. This is even the British doctrine in the case of *Doe vs. Acklam*, before referred to. The act of attainder passed by the legislature of the state of New York, by which Charles Inglis is declared to be for ever banished from the state, and adjudged guilty of treason if ever afterwards he should be found there, must be considered a release of his allegiance, if ever he owed any to the state. 1 Greenleaf's Ed. L. N. Y. 26.

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From the view of the general question referred to in this court, the answers to the specific inquiries will, in my judgment, be as follows.

1. If the defendant was born before the 4th of July 1776, he was born a British subject; and no subsequent act on his part, or on the part of the state of New York, has occurred to change that character; he of course continued an alien, and disabled from taking the land in question by inheritance.

2. If born after the 4th of July 1776, and before the 15th of September of the same year, when the British took possession of New York, his infancy incapacitated him from making any election for himself, and his election and character followed that of his father, subject to the right of disaffirmance in a reasonable time after the termination of his minority; which never having been done, he remains a British subject, and disabled from inheriting the land in question.

3. If born after the British took possession of New York, and before the evacuation on the 25th of November 1783, he was, under the circumstances stated in the case, born a British subject, under the protection of the British government, and not under that of the state of New York, and of course owing no allegiance to the state of New York. And even if the resolutions of the convention of the 16th of July 1776 should be considered as asserting a rightful claim to the allegiance of the defendant and his father, this claim was revoked by the act of 1779, and would be deemed a release and discharge of such allegiance, on the part of the state, and which having been impliedly assented to, by the defendant, by withdrawing with his father from the state of New York to the British dominions, and remaining there ever since, worked a voluntary dissolution, by the assent of the government and the defendant, of whatever allegiance antecedently existed, and the defendant at the time of the descent cast was an alien, and incapable of taking lands in New York by inheritance.

4. When Charles Inglis, the father, and John Inglis, his son, withdrew from New York to the British dominions, they had the right of electing to become and remain British subjects. And if the grand assize shall find, that in point of

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fact they had made such election, then the defendant at the time of the descent cast was an alien, and could not inherit real estate in New York.

III. The next question is, whether the will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question, so as to defeat the defendant in any respect; the premises being at the date of the will, and ever since, held adversely by the tenants in the suit.

Mrs Brewerton was the sister of Robert Richard Randall, and if the devise in his will is void and cannot take effect, she, as one of his heirs at law, would be entitled to a moiety of the lands in question. She died in the year 1815, having shortly before made her last will and testament, duly executed and attested to pass real estate. By this will she devised and bequeathed all her real and personal estate, whatsoever and wheresoever, in law and equity, in possession, reversion, remainder, or expectancy (except some specific legacies) unto her executors, upon certain trusts therein mentioned. If this will was therefore operative, so as to pass her right to her brother's estate, it will defeat the defendant's right to recover, as to one moiety of the premises in question.

The objection taken to the operation of this will is, that the premises were at the date thereof, and ever since have been held adversely by the tenants in the suit.

The validity of this objection must depend upon the construction of the statute of wills in the state of New York. By that statute (1 N. Y. Rev. Laws, 364, sec. 1.) it is declared, that any person having any *estate of inheritance*, either in severalty, in coparcenary, or in common, in any lands, tenements, or hereditaments, may at his own free will and pleasure, give or devise the same, or any of them; or any rent or profit out of the same or out of any part thereof, to any person or persons, (except bodies public and corporate) by his last will and testament, or any other act by him lawfully executed.

This being a question depending upon the construction of a state statute, with respect to the title to real property, it has been the uniform course of this court, to apply the

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same rule that we find applied by the state tribunals in like cases. 1 Peters, 371. This statute upon the point now under consideration has received a construction by the supreme court of the state of New York, in the case of Jackson *vs.* Varick, 7 Cowen, 238. The question arose upon the validity of a devise in the will of Medcef Eden, the younger. The objection was, that at the time of the devise, and of the death of the testator, the premises in question were, and had been for several years before in the adverse possession of the defendant, and that he and those under whom he claimed entered originally, without the consent of the devisor or any one from whom he claimed. The court say, the facts present the question whether the owner in fee can devise land, which, at the time of the devise and his death, is in the adverse possession of another. That is, whether a person having a right of entry in fee simple, shall be said to have an estate of inheritance in lands, tenements or hereditaments in the language of our statute of wills.

It is unnecessary to pursue the course of reasoning which conducted the court to the conclusion to which it came. The result of the opinion was, that under the comprehensive words used in the act, a right of entry, as well as an estate in the actual seisin and possession of the devisor, was devisable; and that an estate that would descend to the heir is transmissible equally by will. The judge who delivered the opinion adverted to some cases that had arisen in the same court, wherein a contrary doctrine would seem to have been recognized, but came to the conclusion, that no decision had been made upon the point.

In the case of Wilkes *vs.* Lion, 2 Cowen, 355, decided in the court of errors, in New York, one of the points relied upon by the counsel for the plaintiff in error, was, that this same will of Medcef Eden, the younger, was inoperative as to the premises then in question; they being lands of which he was not seized at the time of his death. I do not find that any direct opinion was given upon this point; but the objection must have been overruled, or the court could not have come to the conclusion it did.

It is said, however, by the defendant's counsel, that these

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cases do not apply to the one now before the court; but only such estate as would descend to the heir of the devisor, and that the premises in question here would not descend to the heirs of Mrs Brewerton for want of actual seisin. According to the rule laid down in *Watkins on Descents*, 23, that where the ancestor takes by purchase, he may be capable of transmitting the property so taken to his own heirs, without any actual possession in himself; but if the ancestor himself takes by descent, it is absolutely necessary, in order to make him the stock or terminus, from whom the descent should now run, and so enable him to transmit such hereditaments to his own heirs, that he acquire an actual seisin of such as are corporeal, or what is equivalent thereto, in such as are incorporeal.

It is very evident, however, that the court could not have intended to apply this rule to the construction of the statute of wills. For they say, in terms, that the question is, whether a person having a right of entry in lands has an estate of inheritance devisable, according to the provisions of the statute. But under the common law rule referred to, a person having only a right of entry, would not be accounted an ancestor from whom the inheritance would be derived. 2 Black. Com. 209. Such a construction would be in a great measure defeating the whole operation of the act.

The defendant in this case states in his count, that upon the death of Robert R. Randall, the right to the land descended to Paul R. Randall and Catherine Brewerton in moieties. So that, by his own showing, she had a right of entry, which, according to the express terms of the decisions in *Jackson* and *Varick*, was devisable.

The answer to this question must accordingly be, that the will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question, notwithstanding the adverse possession held by the tenants in this suit, at the date of the will.

IV. The fourth point stated is, whether the proceedings against Paul Richard Randall, as an absent debtor, passed his right or interest in the lands in question to, and vested the

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same in, the trustees appointed under the said proceedings, or either of them, so as to defeat the defendant in any respect.

Paul R. Randall, as stated in the case, died some time in the year 1820. He and his sister Mrs Brewerton were the heirs at law to the estate of their brother Robert Richard Randall. If therefore the will of Mrs Brewerton operated to pass her right, Paul R. Randall would be entitled to the other moiety. If her will did not operate, then he would be entitled to the whole of his brother's estate.

It does not appear from the case that any objections were made to the regularity of the proceedings against Paul R. Randall, under the absconding debtor act; and indeed the question, as stated for the opinion of this court, necessarily implies that no such objection existed. The question is, whether his right in the land passed to, and became vested in the trustees.

As this is the construction of a state law, this court will be governed very much by the decisions of the state tribunals in relation to it. The question is, whether a right of entry passes under the provisions of the absconding debtor act of the state of New York, 1 Rev. Laws, 157. By the first section of the act, the warrant issued to the sheriff commands him to attach, and safely keep, *all the estate, real and personal*, of the debtor. The tenth section authorises the trustees to take into their hands all the estate of the debtor, whether attached as aforesaid or afterwards discovered by them; and that the said trustees, from their appointment, shall be deemed vested with all the estate of such debtor, and shall be capable to sue for and recover the same. And the trustees are required to sell all the estate, real and personal, of the debtor, as shall come to their hands, and execute deeds and bills of sale, which shall be as valid as if made by the debtor himself.

These are the only parts of the act which have a material bearing upon this point. And the first question that would seem to arise is, whether the term *estate*, as here used, will extend to the interest which the debtor has in lands held adversely. An estate in lands, tenements, and hereditaments, signifies such interest as a person has therein, and is the con-

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dition or circumstance in which the owner stands with regard to his property. Coke. sec. 345. a. 2 Black. Com. 103.

The language of the act is broad enough to include a right of entry; and there can be no reason to believe that such was not the intention of the legislature.

The doctrine of the court of common pleas in England, in the case of *Smith vs. Coffin*, 2 H. Black. 461, has a strong bearing upon this question. The language of this absconding debtor act, with respect to the estate of the debtor to which it shall extend, is as broad as that of the English bankrupt laws, and the same policy is involved in the construction. In the case referred to, the court say, the plain spirit of the bankrupt law is, that every beneficial interest which the bankrupt has, shall be disposed of for the benefit of his creditors. On general principles, rights of action are not assignable, but that is a rule founded on the policy of the common law, which is averse to encouraging litigation. But the policy of the bankrupt law requires that the right of action should be assignable, and transferred to assignees, as much as any other species of property. Its policy is, that every right, belonging in any shape to the bankrupt, should pass to the assignees.

The estate of the debtor, under the New York statute, becomes vested in the trustees, by the mere act and operation of law, without any assignment.

The courts in New York have given a literal construction to this act, whenever it has come under consideration, so as to reach all the property of the absconding debtor. In the matter of *Smith*, an absconding debtor, 16 Johns. 107, the broad rule is laid down that an attachment under this act is analogous to an execution. And in the case of *Handy vs. Dobbin*, 12 Johns. 220, when the proceeding was under another statute, 1 Rev. Laws, 398, very analogous to the one under consideration, the court say, there can be no doubt that the constable, under the attachment, could take any goods and chattels which could be levied on by execution. The authority in both cases is the same. And in *Jackson vs. Varick*, 7 Cowen, 244, it is laid down as a rule admitting of no doubt, that a right of entry may be taken and sold under an execution.

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It is said, however, that this right of entry does not pass, because, by the tenth section of the act, it is declared, that the deeds given by the trustees shall be as valid as if made by the debtor, and that the debtor could not make a valid deed of lands held at the time adversely.

This objection does not apply to the case: the question does not arise upon the operation of a deed given by the trustees. The point is, whether the trustees themselves had any interest in these lands: not whether they would give a valid deed for them, before reducing the right to possession. If it should be admitted that they could not, it would not affect the present question. The right is vested in the trustees by operation of law, the act declaring *that the estate shall be deemed vested in them on their appointment*, and that they shall be capable to sue for and recover the same; implying thereby that a suit may be necessary to reduce the estate of possession.

Again, it is said, that after such a lapse of time, it is to be presumed that all the debts of Paul R. Randall have been paid, and the trust of course satisfied; and that the estate thereupon became revested in Paul R. Randall.

This objection admits of several answers. It does not appear properly to arise under the point stated. But the question intended to be put would seem to be, whether the right, being a mere right of entry, passed, and became vested in the trustees. If it did so vest, it could not be revested, except by a reconveyance, or by operation of law, resulting from a performance of the trust, by paying off all the debts of the absent debtor. And whether these debts have been satisfied, is a proper subject of inquiry for the grand assize. There is not enough before this court to enable it to decide that point. It is a question of fact, and not of law. If it was admitted that all the debts have been satisfied, the effect of such satisfaction would be a question of law. The evidence might probably warrant the grand assize in presuming payment; but even that may not be perfectly clear. The order of the court upon the trustees to pay to the agent or attorney of Paul R. Randall five thousand five hundred dollars, out of the money remaining in their hands, does not

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purport to consider this sum as the surplus after payment of all the debts. It was to be paid out of the moneys remaining in the hands of the trustees, thereby fully implying, that their trust was not closed. And if the fact of payment and satisfaction of the debts is left at all doubtful, this court cannot say, as matter of law, that the interest in the land became revested in Paul R. Randall. It must depend upon the finding of the grand assize.

It is objected, however, that the defence set up, and embraced in the two last questions, is inadmissible. That in a writ of right, the tenant cannot, under the mise joined, set up title out of himself, and in a third person. That it is a question of mere right between the demandant and the tenant. And it has been supposed, that this is the doctrine of this court in the case of *Green vs. Liter*, 8 Cranch, 229. If any thing that fell from the court in that case will give countenance to such a doctrine, it is done away by the explanation given by the court in *Green vs. Watkins*, 7 Wheat. 31; and it is there laid down, that the tenant may give in evidence the title of a third person, for the purpose of disproving the demandant's seisin. That a writ of right does bring into controversy the mere right of the parties to the suit, and if so, it, by consequence, authorises either party to establish by evidence, that the other has no right whatever in the demanded premises; or that his mere right is inferior to that set up against him. And this is the rule recognized in the supreme court of New York. In the case of *Ten Eyck vs. Waterberry*, 7 Cowen, 52, the court say, that in a writ of right, the mise puts the seisin in issue, as the plea of not guilty in ejectment puts in issue the title, and that under the mise any thing may be given in evidence, except collateral warranty. The same rule is laid down by the supreme judicial court of Massachusetts, in the case of *Poor vs. Robinson*, 10 Mass. Rep. 131; and such appears to be the well settled rule in the English courts. Booth, 98, 115, 112. 3 Wilson, 420. 2 W. Black. Rep. 292. 2 Saund. 45 f. note 4. Stearns on Real Actions, 227, 228, 372.

The answer to this question will accordingly be in the affirmative, unless the grand assize shall find that the trusts have been fully performed; and if so, the interest in the land

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will by operation of law become vested in Paul R. Randall,

V. Another point submitted to this court is, whether, inasmuch as the count in the cause is for the entire right in the premises, the defendant can recover a less quantity than the entirety.

This is rather matter of form, without involving materially the merits of the case. And as the action itself has become almost obsolete, it cannot be very important how the point is settled. I have not therefore pursued the question to see how it would stand upon British authority. The leaning of the courts in that country is against the action, and against even allowing almost any amendments, holding parties to the most strict and rigid rules of pleading; and it may be that the English courts would consider, that the recovery must be according to the count. But whatever the rule may be there, I think it is in a great measure a matter of practice, and that we are at liberty to adopt our rule on this subject. And no prejudice can arise to the tenant by allowing the defendant to have judgment for and recover according to the right which, upon the trial, he shall establish in the demanded premises. The cases referred to, showing that a defendant may abridge his plaint, do not apply to a writ of right. This is confined to the action of assize, and authorised by statute 21 Hen. 8, ch. 3. This statute has been adopted in New York, 1 Rev. Laws, 88, but does not help the case. But independent of any statutory provision, I see no good reason why the defendant should not be allowed to recover according to the interest proved, if less than that which he has demanded.

It is the settled practice in the supreme judicial court in Massachusetts, in a writ of entry, to allow the defendant to recover an undivided part of the demanded premises. The technical objection, that the verdict and judgment do not agree with the count, is deemed unimportant; the title being the same as to duration and quality, and differing only in the degree of interest between a sole tenancy and a tenancy in common. The tenant cannot be prejudiced by allowing this. He is presumed to know his own title, and might have dis-

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claimed. The courts in that state consider, that with respect to the right to renew a part of the land claimed, there is no distinction between a writ of entry and an action of ejectment. 2 Pick. 387. 3 Pick. 52. Nor is it perceived that any well founded distinction, in this respect, can be made between the action of ejectment and a writ of right.

The opinion of the court upon this point is, that under a count for the entire right, a demandant may recover a less quantity than the entirety.

Mr Justice JOHNSON.

I concur in the opinion in favour of this devise; but this is one of those cases in which I wish my opinion to appear in my own words.

This case comes up on a certified difference of opinion on five points. I take them in their order on the record, not that in which they were argued. The first, which is a technical question, and of minor importance, I shall pass over.

The second, which depends upon the civil or political relation in which the demandant Inglis stands to the state of New York, has been exhibited under four aspects. The first contemplating him as born in the city of New York before the 4th of July 1776. The second, as born after that period, but before the British obtained possession of the place of his birth. The third, as born in New York while a British garrison. The fourth, as born an American citizen, before the treaty of peace, but having elected to adhere to his allegiance to Great Britain. In the argument there was a fifth aspect of the question presented, which depended upon the act of confiscation and banishment by the state against the father of the demandant. On the subject of descent, in Shanks's case, which having been argued first in order, I had prepared first to examine; I have had occasion to remark, that the right being claimed under the laws of the particular state in which the land lies, the doctrines of allegiance, as applicable to the demandant, must be looked for in the law of the state that has jurisdiction of the soil.

In this respect the laws of New York vary in nothing material from those of South Carolina. By the twenty-fifth arti-

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cle of the constitution of New-York of 1777, the common law of England is adopted into the jurisprudence of the state. By the principles of that law, the demandant owed allegiance to the king of Great Britain, as of his province of New York. By the revolution that allegiance was transferred to the state, and the common law declares that the individual cannot put off his allegiance by any act of his own. There was no legislative act passed to modify the common law in that respect; and as to the effect of the act of confiscation and banishment, the constitution of the state has in it two provisions which effectually protect the demandant against any defence that can be set up under the effect of that act. The thirteenth article declares that "no member of the state shall be disfranchised or deprived of any of the rights or privileges secured to the subjects of the state by that constitution, unless by the laws of the land or the judgment of his peers." And the forty-first declares, "that no act of attainder shall be passed by the legislature of the state for crimes other than those committed before the termination of the present war, and that such acts (which I construe to mean acts of attainder generally) shall not work a corruption of blood."

I shall therefore answer the second question in the affirmative; that is, that he was entitled to inherit as a citizen, born of the state of New York.

On the third question, there were two points made. 1. That Mrs Brewerton having never entered, could not devise. 2. That the issue being joined upon the mere right, it was not competent for the tenant to introduce testimony to prove the interest out of the demandant, unless (I presume it was meant) the right be proved to be in the tenant. On the first of these points I am satisfied, that the state of New York has not suffered the exercise of the testamentary power to be embarrassed with the subtleties of the English law respecting entries and adverse possessions. The words of their statute of wills are broad enough to carry any right or interest in lands, and such practically seems to have been the uniform understanding in that state.

On the second point, under this question, the facts seem to furnish a very obvious answer. Whatever be the rule in

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other cases, and I do not feel myself called upon to say what the rule is, it certainly can have no application here, since it is *through* Mrs Brewerton that the defendant has to trace his title. Certainly then it must be a good defence, if the tenant can establish that it could not pass through Mrs Brewerton, if she had prevented its descending by an act of her own, valid to that purpose. That question also I should answer in the affirmative.

On the fourth question, I feel it difficult to give a precise answer. An attachment, and conveyance under it, are equivalent to an execution executed. But then there is reason to believe, that the situation in which we find this attachment is analogous to that of an execution, satisfied without the sale of this particular property levied upon. Then could such an execution interfere with the rights of the heir?

It does not appear to me that this question can be answered until the fact of satisfaction can be affirmed or repelled. It is for or against the defendant, according to that alternative.

The fifth is the material question, and since it has been acknowledged in argument, that this suit was instituted on the authority of the case of the Baptist Association, it is necessary first to determine the doctrine which that case establishes.

The devise there was of lands lying in Virginia; the intended devisee was an unincorporated society, described in the will as meeting at Philadelphia; that society became incorporate under a law of Pennsylvania, not of Virginia, and then brought suit in equity in Virginia, to recover the property devised.

At the hearing, the court decided upon the single question, "whether the plaintiffs were capable of taking under that will," and accordingly this court certify an opinion to no other point. Its language is, "that the plaintiffs are incapable of taking the legacy for which this suit was instituted." And, notwithstanding the marginal notes of the reporter to the contrary, that I consider as the only point decided in the cause. What the law of the case would have been, had the attorney general of Virginia been made a party to the

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suit, and (I presume also as a necessary inference,) had the society been incorporated by Virginia, in order to enable them to take the legacy, this court expressly declines deciding (p. 50); and certainly it would have been deciding between parties not before it, had it undertaken in that suit to pass upon the interest in, or power over the subject existing in the state of Virginia. The statute of 43 Eliz. had been expressly repealed in Virginia, previous to the death of Hart, the testator; and although the learned judge who delivered the opinion of the court, goes so much at large into the origin, construction and effect of that statute, it could only have been to prove all that the case required to have established, to wit, that it is under that statute alone that, even in England, a court of equity could extend to the complainants the relief which they craved. That statute being repealed in Virginia, it followed that the equity powers of the state courts, and of consequence that of the circuit court of the United States, could no longer be exercised over the subject of the charities embraced in that statute; that the state of Virginia, where the land lay, and not the state of Pennsylvania, stood in the relation of *parens patriæ*, and therefore, that those powers and those rights which the crown exercises over charities in England, in order to sustain and give effect to them, could only be exercised in that case by Virginia.

So far I consider the decision as authority, and so far it would require more than ordinary ingenuity to excite a reasonable doubt of its correctness. I consider it as too plain to be questioned, that the powers which the *court of chancery* in Great Britain exercises over bequests of charities, in cases where the interest cannot vest under the rigid rules of law, as applied to other bequests, is vested in that court by, or rather usurped under the statute of Elizabeth. I am not now speaking, it must be noted, of the power of *the crown* in such cases, but of the portion of the prerogative power over charities now exercised by the *court of chancery* in that kingdom.

I consider it as conclusive to prove the peculiar origin of this power, that there lies no appeal from the decision of the

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chancellor in charity cases. Cro. Cha. 40, 351. 4 Viner's Abridg. 496. And when cases occur not enumerated in the statute of Elizabeth, or not strictly analogous thereto, the crown still exercises the power of disposing of them by sign manual. See the cases collected in Viner, *Charit. Uses*, G. 3, and note; also, 7 Ves. 490. So that were the statute of Elizabeth repealed in England to-morrow, I see not by what authority this power could be exercised even there in the chancery courts. The history of this branch of the chancellor's jurisdiction proves that it could not be.

The plain object of the act of 43 Eliz. is to place in commission a troublesome branch of the royal prerogative, and to vest the commissioners with power to institute inquests of office, or by other means to discover charities, or the abuse or misapplication of charities, and to authorise the board to exercise the same reach of discretion over such charities as the crown possessed; subject, however, to a revising and controlling power in the lord chancellor; not a mere judicial power, but a ministerial legislation and absolute power; a power, however, secondary or appellative in its nature, not original. This controlling power being absolute and final, soon swallowed up its parent, and became original and absolute. One judge admitted the precedent of an original bill in a charity case, a second judge satisfied his scruples upon that precedent, and other judges following, regarded it as a settled practice. But in whatever way the power is exercised, whether as original or appellate, no other authority for its exercise has ever been claimed by the chancellor but the 43d Elizabeth.

The correctness of the decision of this court therefore in the Baptist Association case cannot, I think, be disputed. And yet it does in no wise affect the case now before us. But, it is argued that, if the statute 43 Elizabeth be in force in New York, and its courts can exercise an original power under it, or if they can pursue the intermediate steps necessary to the exercise of an appellate or revising power, (six in number, I think, lord Coke makes them, 2 Inst.) still it can only be a suit in chancery, in the name of the people, or of their attorney general, or of the corporation constituted

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by them, although vested with all their interest in, or power over the subject.

To me it appears demonstrable, that the 43 Elizabeth introduces no new law of charities, makes none valid not valid before it passed, but simply places the right and power of the court over charities in other hands. If this were not the case, why should bequests to the universities and great schools, bequests in all cases constituting private visitors, and bequests to towns corporate, (section 2 and 3) hospitals, &c. be excepted from its operation? Why should a more liberal rule be introduced with regard to the enumerated indefinite charities and the excepted cases remain subject to a more rigid system? Certainly the enumerated exceptions in that statute can lose nothing in point of merit or claim to public protection and indulgence, by comparison with those acted upon by the statute. Indeed, the preamble explicitly confines the views of the legislature to enforcing the application of the charities according to the charitable interest of the donor; it is the organization of a machine for carrying that interest into effect, without introducing any new rule of law on the subject of construing, applying, or effectuating that intention.

What then was the law of that day, of the time when the 43 Elizabeth was passed, on the subject of charitable donations? It was a system peculiar to the subject, and governed by rules which were applicable to no other; a system borrowed from the civil law, almost copied verbatim into the common law writers. This will distinctly appear by comparing Domat with Godolphin, in the Orphan's Legacy.

It has been said that there are neither adjudged cases nor dicta of elementary writers on the subject of the law as it stood previous to the 43 Elizabeth; but this I think is not quite correct. In Swinburn on Wills, as well as Godolphin's Orphan's Legacy, both books of great antiquity and of high authority, we find all the rules for construing, enforcing and effectuating charities which have been maintained and acted upon in the chancery since the 43 Elizabeth, laid down as the existing laws of charitable devises; and yet the statute of Elizabeth is not quoted by either as the authority

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for their doctrines ; but their margins are filled with quotations from books which treat of the civil and common law. God. Orph. Leg. Sec. Ed. 1676, P. 1, ch. 5, sec. 4, p. 17. Swinb. on Wills, P. 1, sect. 16. And in so modern a book as Maddock's Cha. Vol. I. 47, we find the law laid down in these words : " it has been an uniform rule in equity, *before* as well as after the statute of 43 Elizabeth, ch. 4, that where uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses ; and then goes on to enumerate all that variety of cases to which the English courts have applied the latitudinous principle, that the statute of charitable uses supplies all the defects of an assurance which the donor was capable of making, even to a devise by a lunatic.

Nor are these authors without adjudications to sustain the position, that the law was such *before* as well as after the statute 43 Eliz. Rolt's Case in Moore, p. 855, was the case of a will which occurred long before the statute of Eliz. passed. The devise was of land not in use, and not devisable by law or custom; so that had it been to an individual, it had been clearly void. Accordingly, the heir at law entered; yet, after the statute of Elizabeth, it was hunted up and returned upon inquest, under the statute ; and the lord chancellor on an appeal, having called in the aid of the *two common law chief justices*, they all held it a good limitation or appointment. Now there never has been a time when a subsequent statute, general in its provisions, as was that of charitable uses, could divest a right legally descended upon an heir at law. It follows, that the devise must have been good without the aid of that statute ; this decision took place in court twenty years after the date of the statute.

So also in Revett's Case in the same book, p. 890, when the will was made and the death of the devisor took place in 1586, about seven years before the statute of 43 Elizabeth, and there had been no surrender, the land being copyhold, so that the devise to the charity was clearly void if made to an individual, and accordingly the younger son entered ; the charity was enforced against a purchaser from the heirs,

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under the idea that it was good as an appointment ; clearly in pursuance of the rule, that wherever the donor has power to convey, and manifestly intends to convey, the law will make good every deficiency in favour of charities.

And in the case of sir Thomas Middleton, which also happened before the statute, and where the legal defect lay in the legal insufficiency of the party in interest, and which was not a case of devise, yet it was held good.

It is true Perkins gives an instance of a very early date (40 Edw. 3 ; see Perkins, sec. 510), of a devise to a society not incorporated with power to purchase, in which the devise was held void ; but on that case it may be remarked, that as the clergy had an exclusive possession of the court of chancery for many years after, (to 26 Henry 8), it is easy to perceive how the law of charities came to be improved to what it appears to have been at the date of the cases quoted from Moore. And there are two other remarks applicable to the cases in Perkins. In a modified sense those devises are held to be void even at this day, and to need the aid of a royal prerogative still existing in the court, to relieve the devisees against the rules of the common law. It is obvious that property, devised to charities under such circumstances as prevent its vesting by the rules of the common law, is placed in a situation analogous to that of escheat, and afterwards disposed of under the king's sign-manual, according to his conscience, actual or constitutional ; so that in a trial at *common law*, such devise would be held void, unless aided by prerogative power.

And secondly, there is this difference between the case in Perkins and the present case, that the former is expressed in words which contemplate vesting presently ; the latter, in words which contemplate a future vesting : which I consider an all important feature in the present case, and one which may give validity to the present devise, without resorting to the aid of those principles which appear peculiar to charitable bequests.

But as a charity, to be governed by the law of the state of New York, it appears to me almost idle to view this case with

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reference to any other rule of decision than their own adjudications. The case of the Trustees of New Rochelle, 8 Johns. Ch. Rep. p. 292, was a case of greater difficulties than the present; for there the devise is immediate in presenti, to a devisee having no capacity to take at the time. The legislature afterwards gave that capacity, and the court held the devise valid; nor is it unimportant in that case to observe, that the case in Ambler, 422, of the devise to "the poor inhabitants of St. Leonard's Shore-Ditch," is recognised as authority; as well as that of the Attorney General *vs.* Clarke, in the same book, 651.

Now this decision seems full to these points: 1. That the legislature of that state can, *ex post facto*, give a capacity to take a charity, where there was no such capacity existing at the time of devise over, is a case where the future existence of that capacity was not contemplated by the testator. 2. That an act of incorporation, with capacity to take, dispenses with the presence of the representative of the state, in a suit to recover such a charity.

What more can be required in the present case, especially where the devisee is the party demandant.

It is no objection to the authority or the New Rochelle case, that it was a suit in equity; for in a case like the present, where nothing is wanting but a competent party to sue or be sued; whenever that party comes in *esse*; there can be no reason why the suit should not be at law, if courts of law are competent to give relief. Had the devise been void in the case referred to, the estate must have vested in the legal representative, and could no more have been shaken in equity than at law.

But I have said, that the defendant here might dispense with the aid of the peculiar principles of the law of charities; and my opinion distinctly is, that the devise is good upon general principles, in every respect, unless it be in the time of vesting; then it is not restricted within the legal limits, since the legislature may, by possibility, never constitute the corporation contemplated in the will.

It is in general true, that where there is a present immediate devise, there must exist a competent devisee, and a

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present capacity to take. But it is equally true, that if there exists the least circumstance from which to collect the testator's contemplation or intention of any thing else than an immediate devise to take effect in presenti, then, if confined within the legal limits, it is good as an executory devise.

This is the case of a devise to an infant in *ventre sa mere*; and this the ground of the distinction in Hobart 33, of a present devise to a corporation where it is or is not in progress towards positive existence.

Now the present case is one clearly of an alternative devise to such and such official characters, if by virtue of that devise they can take in perpetuity and succession; and if not, then to them when constituted a body politic by positive statute. Here is clearly contemplated a future vesting, to depend on a capacity to take, to be created by a legislative act; and if the passing of that legislative act had been restricted by the will, in point of time, to the lives of the individuals filling those offices at the time of the death of the testator, on what possible ground could the devise have been impeached?

Does then the law invalidate the devise for want of such restriction, or some other equivalent to it? It is perfectly clear that the law of England does not, and never did, as relates to charities; at least where there has been no previous disposition. In this respect it seems to constitute an exception to the law of executory devises; as is implied in the general reference to the prerogative of the crown to give it legal efficiency, by his sign manual, and as is distinctly recognised in the case of the Trustees of New Rochelle, in the courts of New York; a case in which the plaintiffs might as well have waited for ever upon the legislative will, as in the present case.

There may be a reason for this distinction, since it depends upon the sovereign will to prevent the perpetuity at once; and the presumption is, that the legislature will not delay to do that which it ought to do. And whence at last arises this rule against perpetuities? It is altogether an act of judicial legislation, operating as a proviso to the statute of wills; a restriction upon the testamentary power. The

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authority from which the exception emanated could certainly limit it so as to prevent its extension to an object under the care of the sovereign power.

Upon the whole, I am of opinion that the act of incorporation was at least equivalent to the king's sign manual, and vested a good legal estate in the tenant. That although in the interval it should have descended upon the heir, it descended subject to be divested and passed over by that exercise of prerogative power. But I perceive no necessity for admitting that it ever descended upon the heir; since the right of succession seems rather to be in the commonwealth in the case of charities, as *parens patriæ*.

Mr Justice STORY.

This cause was argued with great ability and learning at the last term of this court, and has been held under advisement until this time. In the interval, I have prepared an opinion upon all the points argued by counsel; and upon one of those points of leading importance, I have now the misfortune to differ from a majority of my brethren. Upon another leading point, that of the alienage of the defendant, my opinion coincides generally with that of the majority of the court; but the reasons, on which it is founded, are given more at large than in that now delivered by my brother Thompson. Under these circumstances, I propose to deliver my opinion at large upon all the points argued in the cause, mainly in the order in which they were discussed by the counsel. It is not without reluctance that I deviate from my usual practice of submitting in silence to the decisions of my brethren, when I dissent from them; and I trust, that the deep interest of the questions, and the novelty of the aspect under which some of them are presented, will furnish an apology for my occupying so much time.

The first point is, whether the devise in the will of Robert R. Randall of the lands in question, is a valid devise, so as to divest the heir at law of his legal estate, or to affect the lands in his hands with a trust.

In considering this question, it appears to me that this court is to look into the terms of the will, and to construe

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it according to the intention of the testator. That intention has been justly said to constitute the pole star to guide courts in the exposition of wills. When the intention is once fairly ascertained, it is wholly immaterial that it cannot be carried into effect by the principles of law; for our duty is to interpret, and not to make wills for testators.

In looking at the terms of the present devise, it appears to me clear, that the testator's intention was to vest in certain persons, in their official, and not in their private capacity, all the residue of his estate for a certain charity stated in the devise. The language is, "I give and bequeath the same unto the chancellor of the state of New York, the mayor and recorder of the city of New York, the president of the chamber of commerce," &c. &c. Did he by these terms mean to devise to the individuals who then occupied these offices, the estate in question, or to the persons who might hold them at the time of his death, or to the persons who might successively from time to time hold them? It was certainly competent for him to devise to them personally, and in their private capacity, by their official description. If a testator were by his will to give an estate to the bishop of New York for life, or to him and his heirs, without giving him his christian or surname, there is no doubt that the devise might well take effect, as a devise to the then incumbent in office, as a descriptio personæ. The law does not require, to make a devise or legacy valid, that the party should be designated by his name of baptism or surname. It is sufficient if he be pointed out by any description, leaving no room for doubt as to the identity and certainty of the person. A devise to the eldest son of A. is just as good as if his name were given. A devise to the present president of the United States could be just as good as if his name were written at large in the will. The maxim of law is, that the designation must be certain as to the person to take; and id certum est, quod certum reddi potest. There is no doubt, then, that the chancellor, mayor and recorder, &c. &c. of New York might take as individuals, if such were the intention of the testator. I go farther and say, that if the testator did intend the present devise to them in their

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private characters, they would take not merely an estate for life in the premises, but an estate in fee. My reason is, that the scope and objects of the charity, being perpetual, require that construction of the will to carry into effect the intention of the testator(a).

But the difficulty is in arriving at the conclusion upon the terms of the will, that the testator did mean any devise to them in their private capacities. It is manifest from his language, that he did not devise to the then chancellor, mayor and recorder, &c. &c. in their private capacities, because his language is, that it is to the chancellor, &c. &c. "*for the time being, and their respective successors in the said offices for ever.*" It is then a devise to them, as officers, during their continuance in office, and the estate is to go to their successors in office *for ever*; so that none of the devisees are to take any certain estate to themselves, but only while they continue in office. It is said that the court may reject the latter words, if inconsistent with the avowed intention and objects of the will. If the other language of the will required an interpretation of these words different from the ordinary meaning, there might be good ground for such an argument; but that the devise will, in point of law, become ineffectual if they are not rejected, furnishes no ground for the court to exclude them. Words which are sensible in the place where they occur, and express the testator's intention, are not to be rejected because the law will not carry into effect that intention. If it were otherwise, courts of law would make wills, and not construe them. But what ground is there to say, that the words "*for the time being,*" and "*their successors in office*" ought to be rejected? The former clearly designate what chancellor, mayor and recorder, &c. &c. are meant. How then can the court take one part and reject the other part of the description? How can the court say that the testator meant the then incumbents in office, when he has spoken of them as the incumbents *for the time being?* His intention clearly is that the charity shall be a perpetuity. He devises to the successors in

(a) *Cruise's Digest. Devise, cha. 11, sect. 72.*

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office *for ever*. They are to be the administrators of the charity *for ever*. Upon what ground can the court exclude the successors from the administration of the charity, when the testator has so designated them? Why may we not equally well exclude the present incumbents, as the future? Both are named in the will; both are equally within the view of the testator of equal regard. Suppose all the other incumbents had died, or had been removed from office, is there a word in the will that shows that they or their heirs could still act as trustees, when they ceased to possess office, in exclusion of the actual incumbents? If not, how can the court say that it will defeat the main intention as to the administrators, and yet fulfil the charity as the testator designed it should be executed?

But this exposition does not rest on a single clause of the will. It pervades it in all the important clauses. In another clause of the will the testator directs that the trustees shall administer the charity "in such manner as the said trustees or a majority of them may from time to time, or *their successors in office may from time to time direct.*" And again, the testator adds, "it is my intention that the institution hereby directed and created should be *perpetual, and that the above mentioned officers for the time being, and their successors* should for ever continue and be the governors thereof, and have the superintendence of the same." Here is a most deliberate re-statement of his intention and objects. The governors and administrators of his charity are not to be the then incumbents in office, but the officers for the time being; not the individuals when out of office, but *their successors in office*. What right then can this court have to say that the successors in office shall not be governors? Would it not be a plain departure from the express intention and solemn declarations of the will? The testator seems to have been apprehensive, that after all there might be some impediment in carrying his intention into effect. What then does he provide? That his intention shall be disregarded? That provisions of his will, as to *successors, &c. &c.* shall be disregarded or rejected? No, so far from it, that he goes on to provide for the emergency, so as to

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give full effect to his intention. His words are, "that it is my will and desire, that if it cannot be legally done, according to my above intention, by them (the trustees) without an act of the legislature, it is my will and desire that they will as soon as possible apply for an act of the legislature to incorporate them for the purposes above specified." So that the successors in the manner above mentioned constituted a primary, as well as a perpetual object of the devise. It seems to me so plain and clear upon the language of the will, that the testator never abandoned the intention of having the trustees take in their official and not in their private capacity, that with great deference to the judgment of others, I am unable to perceive any ground on which to rest a different opinion.

If this is so, then it is next to be considered whether such devise is void at law. I am spared the necessity of going at large into that question, by the decision of this court in the case of the Trustees of the Philadelphia Baptist Association *vs.* Hart's Executors, 4 Wheat. Rep. 1, where the subject was very amply discussed; and for reasons, in my judgment unanswerable, it was there decided that such a devise was void at law. Upon that occasion I had prepared a separate opinion; but that of the chief justice was so satisfactory to me, that I did not deem it necessary to deliver my own.

If the devise was void at law at the time when it was to have effect, *viz.* at the death of the testator, the subsequent act of the legislature of New York could not have any effect to divest the vested legal title of the heirs of the testator. The devise was not a devise to a corporation not in esse, and to be created in futuro. It was a devise in-presenti, to persons who should be officers at the death of the testator, and to their successors in office. The vesting of the devise was not to be postponed to a future time, until a corporation could be created. It was to take immediate effect; and if the trustees could not exercise their powers in the manner prescribed by the testator, they were to apply to the legislature for an act of incorporation. Assuming, then, that a devise *per verba de futuro*, to a corporation not in esse, which

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is to take effect when the corporation should be created, would be good, and vest, by way of executory devise, in the corporation when created, as seems to have been lord chief justice Wilmet's opinion (Wilmet's Opinion, p. 15); it is a sufficient answer that such is not the present case. From the other report of the same case, Attorney General *vs.* Downing, Amb. 550, 571, and Attorney General *vs.* Bowyer, 3 Ves. 714, 727, I should deduce the conclusion, that the case turned upon the peculiar doctrines of the court of chancery in respect to charities; and that Lord Camden's opinion was founded on that. His judgment is not, as far as I know, in print; and whether he thought that *at law* a devise in futuro to an executory corporation would be good, does not appear. In the case before him he acted upon it as a charitable *trust*, not as a devise of the legal estate(a).

But it is said, that there are cases in which it has been held, that a devise to persons in their official capacity is good to the party in his natural capacity; and that it is not true, that, because the devisees cannot take in succession, they cannot take at all: a case from Brook's Abridgement, title Corporation, pl. 34, is relied on. There the principal point was of a different nature: whether a corporation composed of a master and fraternity, could present the master to a benefice. And Pollard, J. on that occasion said, "if J. S. is dean of P. I may give land to him by the name of dean, &c. and *his successors*, and to J. S. and *his heirs*, and there he shall take as dean, and also as a private man; and he is *tenant in common with himself*." Now, the plain meaning of this is, that because he took one moiety in his official capacity to him and his successors, that did not disable him to take the other moiety to him and his *heirs*; but he held the latter in his private capacity. Another case is from Co. Litt. 46, b. where it is said, if a lease for years be made to a bishop and his successors, yet his executors and administrators shall have it in *autre droit*; for regularly no chattel can go in succession in case of a *sole* corporation, no more than

(a) See also, 1 Roll. Ab. Devise, H. sec. 1. Com. Dig. Devise, K.

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if a lease be made to a man and his heirs, it can go to his heirs(a). Now, in the case of a sole corporation, it is manifest that the intention is to give the chattel to the actual incumbent in office, for his life, and he is entitled to hold it beneficially. But no chattel can pass in succession; and then the question arises, whether the court will declare the gift void, as to the residue of the term, or consider the gift absolute. The construction adopted has been to consider the intent to be executed *cy pres*; and, as the testator intended to give the whole, to vest the term absolutely in the bishop, and then by operation of law it would go to his assigns. But this is a case of a *sole* corporation, where the party is capable to take in his corporate, as well as in his natural capacity for life. The present is a case of aggregate persons, not capable of taking in a corporate capacity. To give the estate to them in their natural capacity, and for life only, would defeat the testator's intention; for he meant a perpetuity of trust, and to persons in office, however often the incumbents might change: to give them, in their natural capacities, an estate for life when not officers, would defeat the primary object which he had in view. He meant no beneficial interest to any incumbent, but a charitable trust to a succession of official trustees(b).

It is also said, that in a will a particular may be made to yield to a more general intent. Certainly it may; but then the difficulty in the application of this rule to the present case is, that the argument insists upon a construction which I cannot but deem an overthrow of the general, to subserve an intent not indicated. Because the testator has expressed an intent to be carried into effect one way, which cannot consistently by law be so; and the court can see another way, by which he might have carried it into effect, if he had thought of it; it does not follow that the court can do that which the testator might have done, and new model the provisions of the will. If a testator should per verba de *presenti* devise an estate to a corporation not in esse,

(a) See Co. Lit. 9, a.

(b) See 2 Preston on Estates, 5, 6, 7, 46, 47, 48. Com. Dig. Estates. a. 2.

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and he knew the fact, or mistook the law, the court could not construe the words as *de futuro*, and declare it a good devise to a corporation to be created in *futuro*. The case in 1 Roll. Abridg. Devise, H. l. 50, is decisive of that. The general intention here appears to me to be to create a perpetual trust in certain trustees in succession; for charity; and I can perceive no particular intent, as distinguishable from that general intent. The perpetuity, the succession and the trusteeship, are in his view equally substantial ingredients. So far from allowing any other than the official trustees to administer it, he even points out that if the trust cannot be executed by them, the estate, if it descend to his heirs, shall descend clothed with a trust. And he even appoints the same trustees and *their successors in office* executors of his will.

I come now to the other part of the question, whether, if the devise be void at law, the estate in the hands of the heirs is affected with the trust in favour of the charity. It appears to me most manifest, that it is affected by the trust, if we consult either the intention of the testator or the express terms of the will. The closing paragraph of the will is, in my view of it, decisive, as creating an express trust in the heirs. "It is," says the testator, "my desire, all courts of law and equity will so construe this my said will, as to have the estate appropriated to the above uses; and that the same should in no case, for want of form or otherwise, be construed as that my relations, or any other persons, should heir, possess, or enjoy my property, except in the manner and for the uses herein above specified."

If no trustees had been named in the will to execute the charity, it seems to me very clear that these terms would have created a trust in the heirs. There cannot, as I think, be a doubt, that independent of the statute of mortmain, 9 Geo. 2, ch. 26, the present devise would be held a good charitable devise, and would be enforced in equity, at least since the statute of 43d of Elizabeth of charitable uses. The case of *White vs. White*; of *Attorney General vs. Downing*, Amb. Rep. 550, 571; of *Attorney General vs. Tancred*, Amb. 351, S. C. 1 Eden's Rep. 10; and of *Attorney Gene-*

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ral *vs. Bowyer*, 3 Ves. 714, 717, would alone be decisive; but there are many others to the same effect(*a*). Whether the statute of 43 Elizabeth is in force in the state of New York, or whether, independent of any enactment, a court of equity could enforce this as a charitable trust in the exercise of its general jurisdiction, or as the delegate, for this purpose, of the parental prerogative of the state; or whether such court could hold it utterly void; it is unnecessary for us to consider; that point may well enough be left to the decision of the proper state tribunal, when the case shall come before it. At present I do not think it necessary to say more, than that if the trust be utterly void, then the heirs would by operation of law take the legal estate stripped of the trust. If the trust be good, then it is knit to the estate, and the heirs take it subject to the trust.

But it is said, that if the trust be valid, the legislature had a perfect right to enforce it, and their act of incorporation amounts to a legal execution of the trusts, and vests the estate in the corporation. Now, whatever may be the rights of the state, as *parens patriæ*, to enforce this charity, it can enforce it only as a trust. If the legal estate is vested in the heirs subject to the trust, the legislature cannot by any act, *ipso facto*, divest that legal title, and transfer it to the corporation. It is one thing to enforce a charitable trust, and quite another thing to destroy the legal rights of the parties to which it is attached. If the devise had been to certain trustees by name, upon trust for the charity; could the legislature have a right to divest the legal title? The case of the trustees of Dartmouth College *vs. Woodward*, 4 Wheat. Rep. 518, in its principles, bears against such a doctrine. The right to enforce the trust and operate upon the legal estate is a right to be exercised by judicial tribunals, and not by legislative decrees. The doctrine of the supreme court of New York is, that the legislature thereof has no authority to divest vested legal rights(*b*).

(a) See note on Charitable Uses, 4 Wheat. Rep. Appendix, 1, 11, 12. *Cogshall vs. Felton*, 7 Johns. Ch. Rep. 292. *Kirkbank vs. Hudson*, 7 Price, 212. *Duke Charitable Uses*, by Bridgman, p. 361, 374, 375, 390.

(b) *Dash vs. Van Cleek*, 7 Johns. Rep. 477. *Bradshaw vs. Rogers*, 20 Johns.

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But I cannot admit that the act of incorporation was intended to have such an effect ; it has no terms which divest the legal title of the heirs ; it merely incorporates the trustees and their successors, and clothes them with the usual powers to carry the trust into effect. It presupposes that the estate was already vested in them by the will. They are made "capable in law of holding and disposing of the estate" devised by the will. It is true that the uses are added, "and the same (estate) is hereby declared to be vested in, them and their successors in office for the purposes therein (in the will,) expressed." But this was not, as I think, intended to vest the estate in them as a legislative investiture ; but to declare that the estate was vested in them *for the purposes of the charity*, and not otherwise. The preamble of the act too shows, that the trustees did not ask to have the estate vested in them; but that inconveniences had arisen in the management of the estate from the changes of office. This is very strong to show that the legislature acted solely for the purpose of avoiding such inconveniences, and not to give them an estate to which they then had no title, and which they then professed to have in their management.

In every view, therefore, in which I can contemplate this point, I feel compelled to say that the devise, if a valid devise, is not a devise valid so as to divest the heir at law of his legal estate ; but that the devise can have effect, if at all, only as a trust for a charity fastened on the legal estate in his hands.

In this opinion as to the nature and effect of the devise, in which I have the misfortune to differ from that of the court, I am authorised to say that I have the concurrence of the chief justice.

Another question is, whether the defendant was or was not capable of taking lands in the state of New York by descent ? And this question is presented upon four different aspects of the facts.

In order to explain the views which I take of this part of

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the case, it will be necessary to state some general principles upon the subject of alienage. The rule commonly laid down in the books is, that every person who is born within the liegeance of a sovereign is a subject; and, e converso, that every person born without such allegiance is an alien. This, however, is little more than a mere definition of terms, and affords no light to guide us in the inquiry what constitutes allegiance, and who shall be said to be born within the allegiance of a particular sovereign; or in other words, what are the facts and circumstances from which the law deduces the conclusion of citizenship or alienage. Now, allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth, is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship; first, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or in other words, within the liegeance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to the sovereign, as such, *de facto*(a). There are some exceptions, which are founded upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean, is a subject of the prince to whom his parents then owe allegiance; for he is still deemed under the protection of his sovereign, and born in a place where he has dominion in common with all other sovereigns. So the children of an ambassador are held to be subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince. Birth within the dominions of a sovereign is not always sufficient to create citizenship, if the party at the time does not derive protection from its sove-

(a) See *Calvin's case*, 7 Co. 1. *Doe ex dem' of Duroure, vs. Jones*, 4 Term Rep. 300. 1 Bl. Comm.

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reign in virtue of his actual possession; and on the other hand, birth within the allegiance of a foreign sovereign, does not always constitute allegiance, if that allegiance be of a temporary nature within the dominions of another sovereign. Thus the children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens; but the children of the natives, born during such temporary occupation by conquest, are, upon a reconquest or reoccupation by the original sovereign, deemed, by a sort of postliminy, to be subjects from their birth, although they were then under the actual sovereignty and allegiance of an enemy.

The general principle of the common law also is, that the allegiance thus due by birth, cannot be dissolved by any act of the subject. It remains perpetual, unless it is dissolved by the consent of the sovereign or by operation of law. Upon the cession of a country it passes to the new sovereign; for the sovereign power is competent to transfer it by a voluntary grant. Upon the conquest of the country it passes by operation of law to the conqueror; who as sovereign *de facto* has a right to the allegiance of all who are subdued by his power, and submit to the protection of his arms. Upon the abdication of the government by one prince, it passes by operation of law to him whom the nation appoints as his successor. Thus, by the conquest of England, the allegiance of all Englishmen passed to William the Conqueror; by the abdication of James II. their allegiance passed to William of Orange; and by the cession to France of the Anglo-French provinces of England, the allegiance of the natives passed to the new sovereign. These cases are plain enough upon the doctrines of municipal law, as well as upon those which are recognized in the law of nations.

But a case of more nicety and intricacy is, when a country is divided by a civil war, and each party establishes a separate and independent form of government. There, if the old government is completely overthrown, and dissolved in ruins, the allegiance by birth would seem by operation of law to be dissolved, and the subjects left to attach themselves to such party as they may choose, and thus to become the voluntary subjects,

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not by birth but by adoption, of either of the new governments. But where the old government, notwithstanding the division, remains in operation, there is more difficulty in saying, upon the doctrine of the common law, that their native allegiance to such government is gone, by the mere fact that they adhere to the separated territory of their birth, unless there be some act of the old government virtually admitting the rightful existence of the new. By adhering to the new government, they may indeed acquire all the rights, and be subject to all the duties of a subject to such government. But it does not follow that they are thereby absolved from all allegiance to the old government. A person may be, what is not a very uncommon case, a subject owing allegiance to both governments, *ad utriusque fidem regis*. But if he chooses to adhere to the old government, and not to unite with the new, though governing the territory of his birth, it is far more difficult to affirm, that the new government can compel or claim his allegiance in virtue of his birth, although he is not within the territory, so as to make him responsible criminally to its jurisdiction. It may give him the privileges of a subject, but it does not follow that it can compulsively oblige him to renounce his former allegiance. Perhaps the clearest analogy to govern such cases is to bring them within the rule that applies to cases of conquest, where those only are bound to obedience and allegiance who remain under the protection of the conqueror.

The case of the separation of the United States from Great Britain, is perhaps not strictly brought within any of the descriptions already referred to; and it has been treated on many occasions, both at the bar and on the bench, as a case *sui generis*. Before the revolution, all the colonies constituted a part of the dominions of the king of Great Britain, and all the colonists were natural born subjects, entitled to all the privileges of British born subjects, and capable of inheriting lands in any part of the British dominions, as owing a common allegiance to the British crown. But in each colony there was a separate and independent government established under the authority of the crown, though in subordination to it. In this posture of things the revo-

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lution came; and the declaration of independence acting upon it, proclaimed the colonies free and independent states; treating them not as communities, in which all government was dissolved, and society was resolved into its first natural elements, but as organized states, having a present form of government, and entitled to remodel that form according to the necessities or policy of the people. The language of the declaration of independence is, that congress solemnly publish and declare, "that these united colonies are, and of right ought to be, free and independent *states*; that they are absolved from all allegiance to the British crown; and that all political connexion between them and the *state* of Great Britain is and ought to be totally dissolved; and that as free and independent *states*, they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent states may of right do." It is plain that this instrument did not contemplate an entire dissolution of all government in the states; which would have led to a subversion of all civil and political rights, and a destruction of all laws. It treated the colonies as *states*, and simply absolved them from allegiance to the British crown, and all political connexion with Great Britain. The states so considered it: some of them proceeded to act and legislate before the adoption of any new constitution; some of them framed new constitutions; and some of them have continued to act under their old charters down to the present day. They treated the case as it was treated in England upon the abdication of James II. and provided for it, by resorting to that ultimate sovereignty residing in the people, to provide for all cases not expressly provided for in their laws.

Antecedent to the revolution, the inhabitants of the colonies, whether natives of the colonies, or of any other of the British dominions, owed no allegiance except to the British crown. There was not, according to the common law, any secondary or subordinate allegiance to the colony itself, or the government therein established, as contradistinguished from the general allegiance to the British crown. When, therefore, the declaration of independence absolved all the

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states from allegiance to the British crown, it was an act of one party only. It did not bind the British government, which was still at liberty to insist, and did insist upon the absolute nullity of the act, and claimed the allegiance of all the colonists as perpetual and obligatory. From this perplexing state of affairs, the necessary accompaniment of a civil war, it could not escape the notice of the eminent men of that day, that most distressing questions must arise; who were to be considered as constituting the American *states*, on one side, and "the *state* of Great Britain" on the other? The common law furnished no perfect guide, or rather admitted of different interpretations. If, on the one side, it was said, that all persons born within a colony owed a perpetual allegiance to that colony, whoever might be the sovereign, the answer was, that the common law admitted no right in any part of the subjects to change their allegiance without the consent of their sovereign, and that the usurpation of such authority was itself rebellion; for "nemo potest exuere patriam," was the language of the common law. In respect to persons who were not natives, but inhabitants only, in a colony, at the time of the assertion of its independence, there was still less reason to claim their allegiance. If they were aliens, there was no pretence to say that they could be bound to permanent allegiance against their will. If they were born in England, or elsewhere in the British dominions, out of the colony, they were as little bound to permanent allegiance; because they inhabited, not as colonists, but as British subjects. In respect to both these cases, (i. e. foreigners and British subjects,) no colony, upon assuming to be an independent state, could, against their will, make them members of the state. It would be an exercise of authority not flowing from its rights as an independent state, and at war with the admitted rights of other nations, by the law of nations, to hold the allegiance of their own subjects. In order, therefore, to make such persons members of the state, there must be some overt act or consent on their own part, to assume a character; and then, and then only, could they be deemed, in respect to such colony, to determine their right of election.

Under the peculiar circumstances of the revolution, the

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general, I do not say the universal, principle adopted, was to consider all persons, whether natives or inhabitants, upon the occurrence of the revolution, entitled to make their choice, either to remain subjects of the British crown, or to become members of the United States. This choice was necessarily to be made within a reasonable time. In some cases that time was pointed out by express acts of the legislature; and the fact of *abiding* within the state after it assumed independence, or after some other specific period, was declared to be an election to become a citizen. That was the course in Massachusetts, New York, New Jersey, and Pennsylvania. In other states, no special laws were passed; but each case was left to be decided upon its own circumstances, according to the voluntary acts and conduct of the party. That the general principle of such a right of electing to remain under the old, or to contract a new allegiance, was recognised, is apparent from the cases of the Commonwealth *vs.* Chapman, 1 Dall. Rep. 53. *Caignet vs. Pettit*, 2 Dall. Rep. 234. *Martin vs. The Commonwealth*, 1 Mass. Rep. 347, 397. *Palmer vs. Downer*, 2 Mass. Rep. 179, note. S. C. Dane's Abridg. ch. 131, art. 7, sec. 4. *Kilham vs. Ward*, 2 Mass. Rep. 236, and *Gardner vs. Ward*, 2 Mass. Rep. 244, note: as explained and adopted in *Inhabitants of Cummington vs. Inhabitants of Springfield*, 2 Pick. Rep. 394, and note. *Inhabitants of Manchester vs. Inhabitants of Boston*, 16 Mass. Rep. 230, and *M'Ilvaine vs. Coxe's Lessee*, 4 Cranch, 209, 211(a). But what is more directly in point: it is expressly declared and acted upon, by the supreme court of New York, in the case of *Jackson vs. White*, 20 Johns. Rep. 313. It appears to me that there is sound sense and public policy in this doctrine; and there is no pretence to say, that it is incompatible with the known law or general usages of nations. The case of *Ainslie vs. Martin*, 9 Mass. Rep. 454, proceeds upon the opposite doctrine; but that case stands alone, and is incompatible with prior as well as subsequent decisions of the same court; and so it has been

(a) See also *Chase J. in Ware vs. Hylton*, 3 Dall. 225, 1 Peters's Condens. Rep. 199. *Hebron vs. Colchester*, 5 Day's Rep. 169.

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treated by chancellor Kent, in his learned commentaries.
2 Kent's Comm. 35, 52.

Another point, which necessarily arises in the present discussion, is, whether a party, who, by operation of law, or by the express enactment of the legislature of a state, after the declaration of independence, became a citizen of the state, could afterwards, by any act of his own, *flagrante bello*, divest himself of such citizenship. It is clear, that during the war; however true it might be that the state by its own declaration, or by his consent, might hold him to his allegiance as a citizen, and absolve him from his former allegiance; such declaration or consent could be binding only between him and the state, and could have no legal effect upon the rights of the British crown. The king might still claim to hold him to his former allegiance, and until an actual renunciation on his part, according to the common law, he remained a subject. He was, or might be held to be, bound *ad utriusque fidem regis*. In an American court, we should be bound to consider him as an American citizen only; in a British court, he could, upon the same principle, be held a British subject. Neutral nations would probably treat him according to the side with which he acted at the time when they were called upon to decide upon his rights. It might well be presumed, that from various motives, numbers would change sides during the progress of the contest; some because they were compulsively held to allegiance, and others, again, from a sincere change of opinion. It is historically true, that numbers did so change sides. The general doctrine asserted in the American courts, has been, that natives who were not here at the declaration of independence, but were then, and for a long while afterwards remained, under British protection, if they returned before the treaty of peace, and were here at that period, were to be deemed citizens. If they adhered to the British crown up to the time of the treaty, they were deemed aliens; some of the cases already referred to are full to this point, and particularly *Kilham vs. Ward*, and *Gardner vs. Ward*. In respect to British subjects, not natives, who joined us at any time during the war, and remained with us up to the peace, a similar rule of deeming them citizens has

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been adopted. The cases in 9 Mass. Rep. 454; 2 Pick. Rep. 394; and 5 Day Rep. 169, are to this effect. The ground of this doctrine is, that each government had a right to decide for itself who should be admitted or deemed citizens; that those who adhered to the states and to Great Britain, respectively, were, by the respective governments, deemed members thereof; and that the treaty of peace acted by necessary implication upon the existing state of things, and fixed the final allegiance of the parties on each side, as it was then, *de facto*. Hence the recognition on the part of Great Britain of our independence, by the treaty of 1783, has always been held by us as a complete renunciation on her part of any allegiance of the then members of the states, whether natives or British born. And the same doctrine has been in its fullest extent recognized in the British courts, in the case of *Thomas vs. Acklam*, 2 Barn. & Cress. 779. Lord chief justice Abbott, in delivering the opinion of the court on that occasion, said, that the declaration in the treaty, that the states were free, sovereign, and independent states, was a declaration that the *people composing the state* shall no longer be considered as subjects of the sovereign by whom such declaration is made. And in a subsequent case, *Auchmuty vs. Mulcaster*, 8 Dowl. & Ryl. Rep. 593; S. C. 5 Barn. & Cress. 771; the same court held, that a native American, born before the declaration of independence, who adhered to the royal cause during the war, still retained his allegiance, and was to be deemed, not an American citizen, but a British subject. Mr Justice Bayley, on that occasion, said, "the king acknowledges the United States to be free, sovereign, and independent states." "Who are made independent? The states. Does not this mean the persons who at *that time* (of the treaty) composed the American states," 8 Dowl. & Ryl. 603. And again he added, "the treaty, &c. &c. made those persons who were at that period of time adhering to the then American government or constituted authorities, free of their allegiance to the crown of these kingdoms, and left them to adopt their allegiance to the new government."

In *Kilham vs. Ward*, 2 Mass. Rep. 236, and *Gardner vs.*

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Ward, 2 Mass. Rep. 244, note, a like doctrine was avowed. The language of the court there was, that by the treaty those who by their adherence and residence had remained the subjects of the king of Great Britain on the one part, and those who by their adherence and residence were then the people of the United States on the other part, were reciprocally discharged from all opposing claims of allegiance and sovereignty. This doctrine appears to me so rational and just, and founded upon such a clear principle of reciprocity and public policy, that it is, I own, extremely difficult for me to admit that the treaty does not indispensably require that interpretation. It is true that the treaty contains no renunciation on our part, of the allegiance of any of our citizens who had adhered to the British crown; but the reason of the omission is obvious. Great Britain claimed the allegiance of all the colonists as British subjects; she renounced by the treaty that claim as to all who *then adhered* to the American states. We acquiesced in that result; and must, in the absence of any stipulation to the contrary, be deemed to admit the allegiance to have been retained, of all whose allegiance was not expressly or impliedly renounced.

I am compelled, however, to admit the language of this court in *M'Ilvaine vs. Coxe's Lessee*, 4 Cranch, 209, 214, leads to an opposite conclusion. There is no doubt that the treaty of peace does not ascertain who are citizens on the one side, or subjects on the other. That is a matter partly of law and partly of fact; but when the fact is ascertained that the party was *de facto*, at the time, under the allegiance of, and adhering to either government, he is to be treated as a subject of that government, and as such, a party to the treaty. What right have the American states to say that all persons shall be deemed citizens who, at any time previous to the treaty, were deemed citizens under their laws; any more than Great Britain has, to hold all persons subjects whom she had previously deemed subjects, in virtue of their original allegiance. Each party must, I think, be presumed to deal with the other upon the footing of equal rights as to allegiance, and to act upon the status in quo the treaty found them. If, however, the case of *M'Ilvaine vs. Coxe's Lessee* is to be deemed not

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an administration of local law, but of universal law and the interpretation of treaties, it overthrows the reasoning for which I contend. I cannot admit its universality of application; on the contrary, sitting in Massachusetts, I should feel myself constrained to re-examine the doctrine as applicable to that state, upon a point which affected her political rights and her soil, and which the courts of the state had the most ample jurisdiction to entertain and determine. In New York there is no decision either way; and it seems to me, therefore, that it is fit to be re-examined upon principle. I adopt the suggestion of lord chief justice Abbott in *Doe ex d. Thomas vs. Acklam*, 2 Barn. & Cress. 798, that the inconvenience that must ensue from considering any large mass of the inhabitants of a country to be at once citizens and subjects of two distinct and independent states, and owing allegiance to each; would, if the language of the treaty could admit of any doubt of its effect, be of great weight toward the removal of that doubt. The treaty ought to be so construed, as that each government should be finally deemed entitled to the allegiance of those who were at that time adhering to it.(a).

With these principles in view, let us now come to the consideration of the question of alienage in the present case. That the father and mother of the defendant were British born subjects, is admitted. If he was born before the 4th of July 1776, it is as clear that he was born a British subject. If he was born after the 4th of July 1776, and before the 15th of September 1776, he was born an American citizen, whether his parents were at the time of his birth British subjects or American citizens. Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth. If he was born after the 15th of September 1776, and his parents did not elect to become members of the state of New York, but adhered to their native allegiance at the time of his birth,

(a) See also 1 Wood. Lect. 382. Dane's Abridg. ch. 181, art. 7.

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then he was born a British subject. If he was in either way born a British subject, then he is to be deemed an alien and incapable to take the land in controversy by descent; unless he had become at the time of the descent cast an American citizen, by some act sufficient in point of law to work such a change of allegiance.

His parents being born British subjects, it is incumbent upon those who set up the defence, to establish, that having a right of choice, his parents elected to become American citizens. This is attempted to be deduced by operation of law, from certain resolutions and acts of the government *de facto* of the state of New York. As early as the 15th of September 1776, his parents joined the British troops in New York, and remained under the protection of the British arms during the war. At the close of the war his father withdrew (his mother being then dead) with the British authorities; and he continued ever afterwards under the protection and allegiance, *de facto*, of the British crown. So far as the acts, therefore, of the parents, manifested by a virtual adherence to the British side, go, they negative any intentional change of native allegiance. But it is said that they were bound to make their election in a reasonable time. I agree to this; but the effect of the omission to manifest an election in favour of the state of New York, was in my judgment decisive of their adhering to the allegiance of their native sovereign. But if it were otherwise, if the election to remain British subjects must be affirmatively established; still, I think, in point of law, under all the circumstances, an election by taking the British protection in September 1776, was within a reasonable time; and the case of *Jackson vs. White*, 20 Johns. Rep. 313, in my judgment warrants such a conclusion.

But it is said that the ordinance of the 16th of July 1776, which declares "that all persons *abiding* within the state of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the state," by necessary conclusion and operation of law made the parents of the defendant American citizens; because they were then *abiding* within the state and deriving

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protection from its laws. Now, assuming that the convention of the state of New York had plenary powers for this purpose, so as to bind a British subject not born in New York to allegiance to the state, from the mere fact of his local residence at the time (a proposition that is encumbered with many difficulties), the term "abiding," as here used, has never been construed to exclude the right of election of persons who were inhabitants at that period, to adhere to the old, or contract a new allegiance. The case of *Jackson vs. White*, 20 Johns. Rep. 313, is decisive of that.

We must then give a rational interpretation to the word, consistent with the rights of parties, and the accompanying language of the ordinance. By "abiding" in the ordinance is meant not merely present inhabitants, but present inhabitancy coupled with an intention of permanent residence. This is apparent from the next clause of the ordinance, where it is declared, "that all persons passing through, visiting, or making a *temporary stay* in the state being entitled to the protection of the laws during the time of such passage, visitation, or temporary stay, owe during the same allegiance thereto." Their "temporary stay" is manifestly used in contradiction to "abiding," and shows that the latter means permanent intentional residence. So Mr Chief Justice Spencer, in *Jackson vs. White*, 20 Johns. Rep. 1, 3, 326, considered it. He says, "residence in this state prior to that event (the declaration of independence) imported nothing as regards the election or determination of such residents to adhere to the old or adopt the new government. The *temporary stay* mentioned in the resolution of the convention passed only twelve days after the declaration of independence by congress, and within five days after the adoption of the declaration by the convention of this state, clearly imports, that such persons who were resident here without any intention of *permanent residence*, were not to be regarded as members of the state;" they had a right to a reasonable time therefore, after the ordinance was passed, to decide whether, with reference to the new government, they would adopt a permanent residence in the state, and to become members thereof.

A similar declaration is to be found in the statute of 1777 of

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Massachusetts, and there the term "abiding" has been construed not only to apply to an intention of permanent residence, but of a prospective abiding (a): The reasoning in the Commonwealth *vs.* Chapman, 1 Dall. Rep. 53, persuasively conducts us to a similar conclusion. This ordinance, then, cannot be deemed to dissolve the native allegiance of the parents of the demandant, unless it shall be clearly established that they intended a permanent residence in New York, and to become members of the state under the new government, anterior to their assuming British protection in September 1776.

But even admitting that his parents did elect to become citizens of New York before the 15th of September 1776, still I am of opinion that the demandant, if he was born after the British took possession of the city of New York, in September 1776, while his parents were under the protection of, and adhering to the British government *de facto*, was to all intents and purposes an alien born. To constitute a citizen, the party must be born not only within the territory, but within the liegeance of the government. This is clear from the whole reasoning in *Calvin's Case*, 7 Co. 6, a. 18, a. b.(b). Now in no just sense can the demandant be deemed born within the liegeance of the state of New York, if, at the time of his birth, his parents were in a territory then occupied by her enemies and adhering to them as subjects, *de facto*, in virtue of their original allegiance.

The act of the 22d of October 1779, which confiscates the estate of the parents of the demandant, throws great light upon this part of the subject; it demonstrates that they were deemed to be then adhering to the British, the enemies of the state. It begins with a preamble reciting that "divers persons holding or claiming property within this state have voluntarily been adherent to the said king (of Great Britain), his fleets and armies, enemies to this state and the said other United States, with intent to subvert the government and liberties of this state and of the said other United States,

(a) See opinion in note. 2 Pick. Rep. 394, 395.

(b) See also Com. Dig. Alien. Bac. Abridg. Alien. A.

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and to bring the same into subjection to the crown of Great Britain ; by reason whereof the said persons have severally justly forfeited all right to the protection of this state, and to the benefit of the laws under which such property is held or claimed." It further declares that the public safety requires "that the most notorious offenders should be immediately hereby convicted and attainted of the offence aforesaid, in order to work a forfeiture of their respective estates, and invest the same in the people of this state." It then enacts, "that John Murray, earl of Dunmore, &c. &c. Charles Inglis of the said city (of New York), and Margaret his wife, (the parents of the defendant), &c. &c. be, and each of them are hereby severally declared to be ipso facto convicted and attainted of the offence aforesaid ;" and then declares their estates forfeited. In the second section it enacts that the same persons "shall be and hereby are declared to be forever banished from this state, and each and every of them, who shall at any time hereafter be found in any part of this state, shall be and hereby is adjudged and declared guilty of felony, and shall suffer death."

This act deserves an attentive consideration on several accounts. It is apparent, upon its face, that it is not an act which purports to be an attainder of citizens of the state only, on account of their treason in adhering to the public enemies ; for it embraces persons who never were, nor were pretended to be citizens ; neither does it affect to confiscate the property on account of the alienage of the persons named therein, by way of escheat. The persons described as subjects of attainder are, "persons holding or claiming property within this state," which description equally applies to citizens and British subjects, and may include foreigners of other nations. It seems, indeed, a summary exercise of the ultimate power of sovereignty, in inflicting the penalty of confiscation upon the property of enemies, *jure belli*. But it demonstrates clearly the sense of the legislature, that the persons named therein were at that time voluntary adherents to the British crown, and enemies of the state ; and it affords a very cogent presumption of such adherence from the time that they first came under British

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protection. It farther denounces such persons as enemies or traitors, who have forfeited all right to the protection of the state; and punishes them by a sentence of perpetual banishment, and makes their residence within the state a capital felony.

Such a sentence, under such circumstances, must be deemed on the part of the state, a perpetual renunciation of the allegiance of those persons, and to deprive them of the rights, and to absolve them from the duties of citizens. There can be no allegiance due where the sovereign expressly denies all protection, and compels the party to a perpetual exile. In this view of the matter, the demandant's parents were by the sovereign act of the state itself absolved from all future allegiance, even if they had antecedently owed any to the state. In this state of things, the treaty of 1783 found the father adhering to the British crown as a native born subject.

What then is the operation of the treaty of 1783? It is clear to my mind, that the father of the demandant must be considered as a party to that treaty on the British side. I say this upon the presumption, which is not denied, that he was then adhering to the British crown; and that he was there recognized and protected as a subject owing allegiance to the British crown. In this state of things the treaty must, upon the grounds which I have already stated, be deemed to operate as an admission that he was in future to owe no allegiance to the state of New York, but he was to be deemed a British subject.

The question then arises as to what was the operation of the treaty upon his son, the demandant, who was then an infant of tender years, and incapable of any election on his own part. It appears to me, that upon principles of public law as well as of the common law, he must if born a British subject, be deemed to adhere to, and retain the national allegiance of his parents, at the time of the treaty. Vattel considers the general doctrine to be, that children generally acquire the national character of their parents (Vattel, B. 1, ch. 19. sec. 212, 219); and it is certain, both by the common law and the statute law of England, that the demandant

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would be deemed a British subject. The argument itself assumes that the defendant now acts officially in that character, and that ever since his arrival of age he has adhered to his British allegiance.

Upon the whole, upon the point of alienage as presented in the case, the following are my opinions under the various postures of the facts.

1. That if the defendant was born before the 4th of July 1776, he was born a British subject.

2. That if he was born after the 4th of July 1776, and before the 15th of September 1776, he was born an American citizen; and that it makes no difference in this respect, whether or not his parents had at the time of his birth, elected to become citizens of the state of New York, by manifesting an intention of becoming permanently members thereof, in the sense which I have endeavoured to explain.

3. That if the defendant was born after the 15th of September 1776, when the British took possession of New York, and while his parents were there residing under the protection of, and adhering to the British crown as subjects, *de facto*, he was born a British subject, even though his parents had previously become citizens of the state of New York.

4. That if the defendant was born after the 15th of September 1776, and could be deemed (as I cannot admit) a citizen of the state of New York in virtue of his parents having, before the time of his birth, elected to become citizens of that state, still his national character was derivative from his parents, and was *under the peculiar circumstances of this case*, liable to be changed during the revolutionary war; and that if his parents reverted to their original character as British subjects, and adhered to the British crown, his allegiance was finally fixed with theirs by the treaty of peace.

5. That it was competent for the British government to insist, at all times during the revolutionary war, upon retaining the allegiance of all persons who were born or became subjects; and for the American states to insist in the like manner. But that the treaty of peace of 1783 released all persons from any other allegiance than that of the party to whom they then adhered, and under whose allegiance they

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were then, *de facto*, found. That if the defendant's father was at that time so adhering, it was a final settlement of his allegiance on the British side; and that the defendant, unless born after the 4th of July 1776, and before the 15th of September 1776, remained, to all intents and purposes, a British subject

6. That if the case of *M'Illvaine vs. Coxe's Lessee*, 4 Cranch, 209, should be thought to have overturned this doctrine so that it is no longer re-examinable, still that in this case the parents had a right to elect to which government they would adhere; and that a period up to the 15th of September 1776, was not an unreasonable time for that purpose; and that unless some prior, clear act of election could be shown, the adherence to the British from the 15th of September to the close of the war, afforded strong evidence to repel the presumption of any prior election to become citizens, arising from the fact of *abiding* in the state up to that period.

From these views, meaning to be understood to leave any disputed facts open for inquiry, (although no other facts seem in dispute, except the actual period of the birth of the defendant) my judgment would be that the defendant was, unless he was born between the 4th of July and the 15th of September 1776, an alien at the time of the treaty of 1783, and has ever since remained so. I agree to the doctrine in *Dawson's Lessee vs. Godfrcy*, 4 Cranch, 321, that the right to inherit depends upon the existing state of allegiance at the time of the *descent cast*, and not merely upon a community of allegiance at the time of birth; and the same doctrine is recognized in the fullest manner in the British courts(a). If the defendant then was an alien at the time of the *descent cast*, he is incapable to inherit the estate in point of law.

But it has been suggested as matter of doubt, whether alienage of the defendant can be taken advantage of or rejected on the mise joined. This objection cannot in my opinion be maintained; it is laid down in the books that every thing in bar upon the merits may be given in evidence under

(a) *Doe ex dom. Thomas vs. Acklam*, 2 Barn & Cress. 779.

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the mise, except collateral warranty ; so it is said in Brooks's Ab. Droit, 48 ; and Booth on Real Actions, 112. That also seems to have been the opinion of the court in Tyssen vs. Clarke, 2 Wils. Rep. 541. Whether the proposition can be maintained in its general latitude, it is unnecessary now to consider ; but it is certainly necessary for the defendant to prove his title as set forth in the writ. If he claims by descent from an ancestor who was seised, he must show that he is heir, and capable to take by descent. The seisin of the ancestor is nothing without establishing his heirship. The cases of Green vs. Liter, 8 Cranch, 229, and Green vs. Watkins, 7 Wheat. Rep. 28, are decisive that in a writ of right the title and mere right of each party are in issue ; and each may establish that the title of the other wholly fails. If, therefore, the defendant has no title by descent, the tenant may show it ; for it goes to the very foundation of his claim.

In this connexion it may be well to dispose of another objection, which was much pressed at the argument. It is this : the defendant in his count alleges the seisin of Robert R. Randall, and makes title by descent to the premises as his next collateral heir on the part of his mother. At the death of Robert R. Randall, he left a brother Paul R. Randall, and a sister, Catherine Brewerton, on whom the alleged right to the lands descended in moieties, and *through whom* (though not *from* whom) the defendant deduces his title by descent, they having died without issue. The tenants offered evidence to establish that Catherine Brewerton had disposed of her right in the premises by will ; and that the right of Paul R. Randall also had been transferred during his life time. Now the objection is, that this evidence is inadmissible, because it is an attempt to set up the title of third persons, to defeat a recovery in a writ of right, which is inadmissible. The cases of Green vs. Liter, 8 Cranch, 229, and Green vs. Watkins, 7 Wheat. Rep. 28, have been relied on to support this objection. Nothing is better settled in this court than the doctrine that a better title in third persons cannot be set up to defeat a recovery in a writ of right, because that writ brings into controversy and comparison the titles of the par-

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ties only ; but it is perfectly consistent with this doctrine, that the tenant may show that the title set up by the defendant is in fact no title at all. One material allegation in the present count is its seisin of Robert R. Randall the ancestor ; and this seisin is admitted, and indeed constitutes a part of the title of both parties in the present case. Another material allegation is, that the *right* to the demanded premises *descended* to the defendant as heir. Now, it is clear upon the general principles of pleading, that what is essential to the defendant's right, as stated in his count, must, when that right is denied by the issue, be proved by the defendant, and may be disproved by the tenant. If, therefore, the defendant be incapable of taking as heir by descent, although there be a *right*, that may be shown by the tenant ; as if he be an alien, because it defeats the asserted *descent* of the title. On the other hand, if the heirship be admitted, and the *right* was parted with by the ancestor, or by any other person, upon whom it intermediately devolved before it could reach the defendant, that, for a better reason, may be shown, because it shows that no *right* or *title* descended at all. Both are necessary to establish the defendant's claim ; there must be a *right* or *title* subsisting, capable of descent, and a capacity in the defendant to take as heir. If the ancestor has actually parted with his whole right and title in the premises by a legal conveyance, how can it be said that there remains any *descendible right* in him ? If his right has been parted with by any intermediate heir by a legal conveyance, how can it be said to have devolved upon the defendant ? The true and real distinction is this : if the defendant shows any right, as stated in his count to have descended to him from his ancestor, the tenant cannot show that there is a better right subsisting in a third person, under whom he does not claim, for that does not disprove the title of the defendant as asserted in his writ ; and if the defendant's title, such as it is, is better than the tenant's, then the defendant ought to recover ; but the tenant may show that the defendant has no right whatsoever by descent, for the possession of the tenant is sufficient against any person who does not show any right, or a better right. And this,

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as I understand it, is the doctrine in *Green vs. Watkins*, 7 Wheat. Rep. 28. Here, title in third persons is offered, not to prove that there is a *better* outstanding title, but that no right whatsoever descended to the demandant, as he claims in his count. It seems to me that it is clearly admissible.

The next point is whether the will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question, so as to defeat the demandant in any respect; the premises being at the date of the will, and ever since, held adversely by the tenants in the suit.

If this point were to be decided with reference purely to the common law of England, there might be some reasons for doubt. The question whether a right of entry was under the British statute of wills devisable, seems never to have been directly decided until a recent period. There is indeed to be found in prior cases, many dicta going to affirm the doctrine that such a right of entry is not devisable. Such seems to have been the opinion of Lord Holt in *Bunker vs. Cook*, 11 Mod. R. 122, and of Lord Eldon in *Attorney General vs. Vigor*, 8 Ves. 282, as well as of other judges in former times, whose dicta are collected and commented on in *Goodright vs. Forrester*, 8 East's Rep. 552, 566, and 1 Taunt. Rep. 604(a). There are also dicta the other way; and at all events there is reasoning which leads to the conclusion, that in modern times the judges have been disposed to give a far more liberal construction to the statutes, and to hold that whatever is descendible is devisable. The cases of *Jones vs. Roe*, 3 Term Rep. 88, and *Goodtitle d. Gurnall vs. Wood*, Willes's Rep. 211, 3 Term Rep. 94, by Lord Kenyon, are most material. In *Goodright vs. Forrester*, 8 East's Rep. 552, the court of king's bench held a right of entry not devisable. But when that case came before the court of the exchequer chamber in error, lord chief justice Mansfield very much doubted that point, and the case was finally decided on another. But it is the less necessary to consider this question upon the English authorities, because it has undergone an express adjudication in the state of New

(a) See also Com. Dig. Devises, M.

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York, upon the construction of their own statute of wills. The statute of New York enacts that any person having an estate of inheritance in lands, tenements and *hereditaments*, shall have a right to devise them. In *Jackson vs. Varick*, 7 Cowen's Rep. 238, the supreme court of New York, upon very full consideration, held, that under this statute a right of entry being an hereditament, was devisable. And this court in *Waring vs. Jackson*, 1 Peters's Rep. 571, understood it to be the settled rule in that state that an adverse possession did not prevent the passing the property by devise. This then being a point of local law, upon the construction of a statute of the state, according to the uniform course of this court in cases of that nature we should hold it decisive, whatever original doubts might otherwise have surrounded it. But as one, I confess myself well satisfied with that decision upon principle. It is rational and convenient; and if I should have felt difficulty in arriving at it through the authorities, I should not be inclined to disturb it when made.

It has been said that the present case differs from that in 7 Cowen's Rep. 238 in this, that the *claimant* claims *through*, but not *under* Mrs Brewerton, not as her heir, but as heir of Robert R. Randall; and that the estate was not descendible to her *heirs* according to the known principles of the common law, as she was never seised of the premises, but to Robert's heirs, as the person last seised. That is true; but it does not alter the application of the principle of law. If Mrs Brewerton had been possessed of a reversion by descent from Robert R. Randall, and she had died before the life estate fell-in, it would not have gone to her heirs, but to *his*. And yet there is no doubt that she might grant such a reversion, or devise it, and it would pass by her will to the devisee and thus interrupt the descent. So, if Mrs. Brewerton had a right of entry in the premises, and she could devise it, it is of no consequence that it would not, if undevised, have passed to her heirs; for having the *jus disponendi*, when she exercises it it passes her right to her devisee, and so interrupts the descent to the heirs of Robert

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R. Randall. It appears to me, therefore, that as to the moiety of Mrs Brewerton it passed under her will, and that the defendant, in any view of his claim, has no title to a moiety of the demanded premises. A right of entry may well pass under the devise of an hereditament(a).

The next question is, whether the proceedings against Paul R. Randall as an absent and absconding debtor passed his right or interest to the other moiety in the lands in question to, and vested the same in the trustees appointed under the same proceedings, so as to defeat the defendant in any respect.

The answer must depend upon the true construction of the absconding debtor acts of 1786 and 1801; as compared with those proceedings. At the time of those proceedings, the premises were in the adverse possession of the tenants; and consequently Paul R. Randall had only a right of entry. And the question is, whether that right of entry passed by the statutes to the trustees; and if so, whether it did not by operation of law revest in him after all these proceedings were *functi officio*, his debts being paid and the surplus paid over to him.

At the common law a right of entry is clearly not grantable or assignable. The party has, in the sense of the common law, no *estate* in lands of which he is disseised; but his estate is said to be turned to a right, and can be recoverable only by an entry or an action. In the mean time he has not any estate in the lands, but he has merely the right to the estate. For this doctrine it is necessary to do no more than to refer to Littleton, sec. 347; Co. Litt. 214 and 345, a. b.; Preston on Estates, 20, and Com. Digest, Assignment, C. 1, 2, 3, and Grant, D.(a). Unless it shall appear that the common law has been differently construed in New York, or altered by some local statute, the same rule must be presumed to prevail there; for, by the constitution of that state, the common law forms the basis of its jurisprudence. No case has been cited in which the rule of the common law on

(a) See *Coffin vs. Smith*, 2 H. Bl. 444.

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this subject has been overturned, or in which it has been decided that the word "estate" includes a right of entry, *proprio vigore*.

But it is said that by the law of New York a right of entry is attachable, and may be taken and sold on execution; and that an attachment under the absconding debtor acts of 1786 and 1801, is deemed analogous to an execution(a). It may, doubtless, well be so deemed in a general sense; but it by no means necessarily follows that because there is such an analogy, therefore, whatever may be taken in execution may be taken on such attachment, or, e converso. The subject of levies under execution, is expressly provided for by the statute of New York of the 31st of March 1801; and what effects or estate may be taken in execution depends upon the true construction of the terms of that act. It declares that "all the *lands, tenements, and real estate*" of every debtor shall be liable to be sold upon "execution," &c. for the payment of any judgment against him for debt or damages. What has been the judicial construction of these words in this act, whether they include a right of entry, does not, as far as my researches extend, appear ever to have been decided. It is indeed suggested by Mr Justice Woodworth, in delivering the opinion of the court in *Jackson vs. Varick*, 7 Cowen's Rep. 238, 244, that the reasonable construction is, that it includes such a right; but the point was not then before the court, and he does not treat it as a point settled by adjudication. The words to which he refers in another part of the act, giving the form of the execution (sec. 9), in which it is confined to lands and tenements *whereof the debtor was seized* on the day when the same land became liable to the debt (by the judgment), would rather incline one to a different conclusion. And it is certain that under the statute of Westminster 2, ch. 18, subjecting lands to execution, lands of which the debtor is disseised at the time of the judgment cannot be taken in execution(b). Be this as it may, it is certain that in New York the process

(a) *Matter of Smith*, 16 Johns. Rep. 102.

(b) 1 Roll. Abridg. 889, Com. Dig. Execution, c. 14.

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upon executions, and under the absconding debtor act are not co-extensive in their reach. A judgment is not a lien upon a mere equity; and such an equity (not being an equitable estate under the statute of uses of 1787, sec. 4), is not an interest which can be sold on execution. And choses in action do not appear to be within the scope of the act respecting executions; for the language confines it to "goods and chattels." Yet choses in action by the express terms of the absconding debtor acts pass under the attachment; and there are various other interests which may well pass under these acts, which yet are not liable to be taken under a common execution. Several cases illustrative of this position, will be found collected in Mr Johnson's Digest, title Execution 2(*n*).

It appears to me, then, that the true mode, by which we are to ascertain whether a right of entry passes under the absconding debtor acts, is not by any forced analogy to the case of common executions, but by a just interpretation of the terms of the act themselves. The act of 1801 is in substance a revision of the act of 1786; no material distinction between them, applicable to the case before the court, has been pointed out at the argument; and they may therefore be treated as substantially the same.

The act of 1801 begins (section 1) by providing for cases of absconding and absent debtors, and upon proof thereof, provides that a warrant shall issue to the sheriff commanding him to attach and safely keep "all the estate *real* and *personal* of such debtor," and make and return a true inventory thereof. Goods, effects and choses in action are expressly declared to be within the reach of the act. It afterwards proceeds to provide for the appointment of trustees, and authorizes them (section 2.) "to take into their hands all the *estate* of such debtor, whether attached as aforesaid, or *afterwards discovered by them*, and all books, vouchers and papers relating to the same; and the said trustees, from their appointments, *shall be deemed vested with all the estate of such debtor*, and *shall be capable to sue for and recover the same*; and all debts and things in action due or belonging to such debtor, and all the estate attached as aforesaid,

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shall be by the sheriff, &c. delivered to the said trustees; and the trustees, or any two of them, shall sell at public vendue after fourteen days previous notice of the time, and place, *all the estate, real and personal of such debtor as shall come to their hands*, and deeds and bills of sale for the same make and execute, which deeds and bills of sale shall be as valid as if made by such debtor," &c. The act afterwards goes on to provide for the distribution of the proceeds of the sales among the creditors, and then declares, that "*the surplus, if any, after all just debts and legal charges as aforesaid are satisfied, shall be paid to such debtor or his legal representatives.*" There is no provision in the act as to what shall be done in respect to any property which never came to the hands of the trustees, nor of any property remaining unsold by them when all the debts were satisfied; and the omission may easily be accounted for from the general policy of the act; for the language is, that the trustees shall sell *all the estate which comes to their hands*. If the point were material I should strongly incline to the opinion, that the act did not *absolutely* divest all right and title out of the debtor of any of his estate, *which should not come to the hands of the trustees and be sold by them*. But whether this be so or not, I am clearly of opinion that when once all the purposes of the trust are satisfied, and all the debts are paid; if the trustees have any legal interest or title vested in them in the estate of the debtor remaining unsold, it is subject to a *resulting use* for the benefit of the debtor, in the same manner as the surplus of the property sold. Suppose, before the sale, all the debts should be paid, must the trustees go on to sell? Suppose all the debts are paid by a sale merely of the personal estate, is not their trust extinguished? The trustees take all the estate in the first place for the benefit of the creditors, and in the next place, they being paid, for the benefit of the debtor. Subject to the rights of the creditors, the use is in him; and by operation of law the estate reverts in him, as soon as the trust for the creditors is exhausted or extinguished. This seems to me a reasonable, if not a necessary construction of the act; for it has provided for no express reconveyance

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by the trustees to the debtor, in any case whatsoever. It certainly could not intend to deprive him of his inheritance after all his debts were paid. And it is but just to give the act a construction favourable to the debtor, when all its other objects are accomplished. In the present case the whole proceedings afford a strong presumption that all the debts of P. R. Randall have been paid; and none are pretended to exist. His right of entry in the demanded premises was never sold by the trustees; and even if it vested in them, it afterwards by operation of law revested in him, if the trusts were all defunct and satisfied. But I go farther, and incline to the opinion that his right of entry in the demanded premises did not pass to the trustees under either of the attachments. The language of the acts of 1786 and 1801 is indeed quite broad, and extends to all the "estate real and personal" of the debtor. But a right of entry is not, as has been already shown, an "estate" in any just and legal sense of the word. Neither is it a "thing in action;" for it does not depend upon any right to sue, but may be enforced by a mere entry. Indeed, a right of action and a right of entry are often used in contradistinction to each other.

The case of *Smith, &c. vs. Coffin*, 2 H. Bl. 444, turns altogether upon other considerations, and upon the interpretation of the words of the English bankrupt laws. Words of a very broad import are used in those laws; and the policy of them is far more extensive than that which governs the laws of New York, now under construction. A construction might be properly adopted in respect to the bankrupt laws, which would not apply to the absconding debtor acts of New York. The general policy of the common law is to discourage the grant or sale of mere rights of entry and action, with a view to suppress litigation. This policy spreads itself over many important interests; and is so fundamental, that nothing but a very clear expression of the legislative intention ought in my judgment to overthrow it. No such intention is to be found in the acts of 1786 and 1801. Can it be reasonably presumed that the legislature meant to authorise the sale of a right of entry to a purchaser? If not, was it the intention to enable the trustees

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to reduce the right into possession, and afterwards to sell the same? I think the former was manifestly not the intention of the legislature; and I found myself on the very words of the acts. The trustees are to sell, not all the estate of the debtor, but all the estate real and personal, "*as shall come to their hands;*" that is, as I construe the words, such as they shall reduce into possession; so that the estate may bring its uncontested value. But for the reasons already stated I incline also to the opinion, that it was not the intention of the legislature to pass the right of entry to the trustees so that they might be enabled to reduce it into possession.

But supposing it to be otherwise; still it appears to me there is much reason to contend that the trustees, if they took the right of entry at all, took it *sub modo* and exactly as Paul R. Randall held it. The legislature did not intend to invest them with a better right than he had. He had a right of entry into the estate vested in him by descent, and he might perfect his estate by an actual entry during his life time. But if he died without such entry, then the right to the estate devolved not upon his own heir, but upon the next heir in the line of descent of Robert R. Randall. In this view of the act, the trustees were bound, then, to reduce the right of Paul R. Randall into possession during his life time, if they meant to perfect their title thereto. Not having done so, the title devolved upon the next heir who claimed, not through them, but from the ancestor from whom Paul R. Randall took it. This, however, is not the main ground on which I rely, though it fortifies some of the considerations already mentioned. The main ground on which I rely is, that whatever construction of the act may be adopted in other respects, as soon as all the trusts of the assignment are executed, there arises a resulting use to the debtor, which, by operation of law, will revest all the unsold estate in him.

Upon the whole, my opinion is, that the proceedings against Paul R. Randall did not pass his right or interest in the lands in question, so as to defeat the defendant in any respect; but if they did, and all the trusts have been satisfied, there is a resulting use to him in the unsold estate.

The next question is, whether, inasmuch as the count in

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the cause is for the entire right in the premises, the defendant can recover a less quantity than the entirety.

This is a question somewhat involved in technical learning, and therefore requires an accurate examination of the authorities. Reasoning upon general principles and the analogies of the law, there would be little difficulty in deciding it in the affirmative; for it is deciding no more than that he who has a right, shall recover according to his right, so, always, that he does not recover more than he sues for. No injury is done to the tenant by allowing the defendant who sues for ten acres and shows a title only to one, to recover for the latter; nor if he sues for an entirety and shows title to a moiety, to recover for the latter. And it is in furtherance of justice that he should so recover; because it prevents multiplicity of suits. For if his suit should abate for this fault, (and that is the only judgment which could be pronounced,) he would still be entitled to a new action for the part to which he had shown title. The falsity of the former writ would constitute no bar.

Let us see, then, how the case stands upon authority. By the old common law, if the writ of the defendant was falsified by his own *confession* (for it is far from being certain that it was ever true, when found by a *verdict* upon the merits, after the general issue joined)(a), as to any thing or part of a thing demanded in the writ, it abated for the whole. If the matter did not appear on the face of the record, but was to be made out by facts dehors, then the tenant, if he meant to avail himself of it, was compelled to do it by a plea in abatement. Thus if he meant to avail himself of non-tenure of the whole, or a part, he must plead it. But where, upon the whole record, the falsity of the writ was apparent by confession of the party, there, although the tenant had not pleaded in abatement, it was the duty of the court, *ex officio*, to abate the writ.

Now, at the common law, there are two sorts of writs in

(a) See *Plowden*, 424, 6. *Hobart's Rep.* 282, 6. *Fitz. Abridg. Breve*, 272. 9 Hen. 6, 54. 11 Co. 45. *Theel. Dig. Lib.* 16, ch. 5.

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real actions. In one the demand is in a general form, without specification of any lands in particular. Thus in the writ of assise, the demand is that the tenant "unjustly and without judgment hath disseised him of *his freehold in C.*"(a), without any further description of the land. So in writs of dower, the demand is of the defendant's "reasonable dower, which falleth to her of *the freehold*, which was of A. her late husband in C., whereof she hath nothing,"(b) without more. The plaint or count is less general, and specifies the particulars of the demand, as a messuage, ten acres of land, &c.(c) In the other sort of writs, the writ itself is as special as the count. Such is the case of all precipes quod redat, such as writs of right, and writs of entry, &c. where the demand is of a certain messuage, or ten acres of land, &c. &c. and the exigency of the writ is that the said tenant should render the same to the defendant without delay(d). Now, it was upon this difference that a distinction took place in the common law as to the right of the defendant to abridge his demand. If the writ was special, he could not abridge his demand in any case. If the writ was *general*, de libero tenemento, he might abridge his demand at his pleasure, so always that he did not abridge it of a moiety or portion, where he sued for the *entirety* of a thing; as if he sued for ten acres he might abridge it to five; but if he sued for the whole of a messuage, he could not abridge it to a moiety. This doctrine will be found at large in many cases; but it is no where better expounded than in the opinion of Mr Justice Juyn, (afterwards chief justice) in 14 Hen. 6, p. 3, 4. He said, "that in all cases where the writ is de libero tenemento generally, as in assise and writs of dower, where the writ is of her reasonable dower, &c. the defendant may abridge his plaint or demand; and the reason is because although he abridges some acres, yet the writ remains true as to the rest, it being liberum tenementum still. But where a cer-

(a) Booth on Real Actions, 210. Fitz. N. B. 177.

(b) 2 Saund. Rep. 43. Booth on Real Actions, 166. Fitz. N. B. 147.

(c) Com. Dig. Assize, B. 11. Booth on Real Actions, 212, and note.

(d) Fitz. N. B. 1, 5, 191. Booth Real Actions, 1, 88, 89, 91, 172.

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tain number of acres is demanded in the writ, as in a formel-ton, the defendant cannot abridge, for he acknowledges his writ false ; and where a writ is acknowledged to be false in part, it must abate it in the whole ; but if in an assise the writ be, he unjustly disseised him de libero tenemento in A. and B. and he would abridge his demand as to all in B. he shall not abridge ; for his writ is false, which supposes him disseised of the tenement in A. and B." As to this last position there is some difference in the authorities ; but the general position is unquestionable law(a). But this doctrine even in relation to assises was of little value to the defendant in many cases, because it stopped short of the most common sources of mistake. If, therefore, he counted against one as tenant of the *whole*, and he pleaded non tenure as to part, or joint tenancy, &c. and it appeared by confession or otherwise, that the plea was true, the writ abated as to the whole, for the falsity of the writ was established in this, that the tenant was sued as the tenant of the *whole*, and was tenant only of *part*. This mischief was cured by the statute 25 Edw. 3, ch. 16, which provided, "that by the exception of non tenure of parcel, no writ shall be abated but for the quantity of the "non tenure, which is alleged"(b). Still, however, many difficulties remained behind ; for if a party sued for an entirety, as of a manor, or a messuage, or one acre, and a bar was pleaded as to a moiety, or part of the land put in view, &c. in the plaint, the defendant could not abridge his plaint to the moiety left, since his writ was for an entirety, and so far false : the distinction was nice, for he might abridge his plaint from two or ten acres to one acre ; but not as to the extent of his title or right in the land put in view. Such, however, as the distinction was, (and it suited the subtlety of the times,) it prevailed until the statute of 21 Hen. 8, ch. 3, which provided, that in assises the defendant might in all such cases abridge his plaint, and proceed for the resi-

(a) See Com. Dig. Abridg. A. 2 Saund. Rep. 44, and note 4. Gilb. Com. Pl. 199, 201, 202, 203. Brooks, tit. Abridg. 14 Hen. 6, p. 4. 9 Hen. 6, p. 42. 3 Lev. 68. Vin. tit. Abridg. Theol. Dig. Lib. 16, ch. 2. Bac. Abridg. Abatement, L.

(b) See Gilb. Hist. C. P. 201.

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due(a). But this statute is confined to assises; and, therefore, left the common law in full force as to all other real actions.

Such is a brief review of the doctrine at common law in respect to the abridgement of plaints by the defendant. It is not, however, to be imagined that the old authorities are all in harmony on this subject. On the contrary, diversities of opinion seem to have existed from an early period. In Godfrey's case, 11 Co. 42, 45, the court proceeded mainly on the rule already stated. Lord Coke, however, thought that the common and true rule and difference is where a man brings an action, be the suit general or certain and particular, and he demands two things, and it appears of his own showing that he cannot have an action or better writ for one of them, there the writ shall not abate for the whole, but shall stand for that which is good. But when a man brings an action for two things, and it appears that he cannot have this writ for one thing, but may have another in another form, there the writ shall abate for all, and shall not stand for that which is good. The distinction has sound sense in it; but it is inapplicable to the present case; because here, the plaintiff has not shown upon the pleadings, that he has no title to maintain his writ for the whole(b).

Writs of *precipe quod reddat* then, except so far as the statute 25 Edw. 3, of nontenure aided them, stood upon the footing of the common law. In respect to them, therefore, the defendant could not abridge his claim except in cases of nontenure; and if his writ could not by his own confession be maintained for the whole for which he sued, his writ abated for the whole; and it was not material whether he sued for the entirety of a certain number of acres, and showed title to a less number; or whether he sued for the whole or a moiety, and showed title only to a less aliquot part(c). But

(a) See Com. Dig. Abridgement, B. Viner, tit. Abridgement. Theol. Dig. Lib. 8, ch. 28. Id. Lib. 16, ch. 2. Keilway, 116, pl. 56. 5 Hen. 7. 19 Hen. 6, 18. Brooks, Abridgement, pl. 2.

(b) See 1 Saund. R. 282, 285, note 7. Com. Dig. Abatement, M. N. Cro. Jac. 104. Theol. Dig. B. 8, ch. 28, sec. 18. 9 Hen. 7, 4. (b).

(c) See Com. Dig. Abatement, L. 1, 2. M. Saville's R. 86. Clanrickard vs. Sidney, Hob. 273, 274, 279, 282. Com. Dig. Abridgement, B. Chatham vs.

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unless the falsity of his writ appeared by his own confession, even though it appeared by the verdict, the better opinion was that the writ was not abated for the whole. Plowden, indeed, in *Bracebridge vs. Cook*, Plowden, 424, thought the objection fatal. But lord Hobart, in *Clanrickard vs. Sidney*, Hob. 272, 282, condemned that opinion as erroneous, and against common experience in his day. And in this last case it was further held that the variance was but matter of form, and at all events cured by the statute of jeofails of 18 Elizabeth, ch. 14, after a verdict, even though it appeared by *confession* of the party, upon the pleadings. In that case the writ was formedon for an entirety ; and upon the demandant's own confession it appeared that he was entitled to recover but two thirds. But the court held, that the parties having gone to trial upon an issue, and the jury having found a special verdict in favour of the plaintiff for the two thirds, his suit was not abateable for the whole, but the error was cured by the statute of jeofails of 18 Elizabeth, ch. 14(a). Whoever will read lord Hobart's learned opinion upon that occasion will perceive the most solid reasons brought in support of it. The doctrine that if a demandant sue for an entirety, he may yet after verdict recover for a moiety, is not only supported by the case in Hobart's Rep. 172, but by the case *Cooper vs. Frankling*, 1 Roll. Rep. 384. S. C. 3 Bulst. 148, and 2 Roll. Ab. Trial, p. 719, pl. 12. The doctrine, that if he sue for a moiety he may recover for a less aliquot part, may be deduced from the same causes, for it stands upon the same reasoning as that applicable to entireties. So was the reasoning in *Saville's Rep.* 48, pl. 165(b). There are many cases in ejectment where the same doctrine has been maintained, and in none of them has any distinction been asserted between an ejectment and real actions. The ground of argument has been the variance between the count and verdict ; so that it has turned upon the falsity of the plaintiff's

Sleigh, 3 Lev. 67. *Viner*, tit. *Abridgement*. *Fitzherbert's Abridgement*, tit. *Breve*, 272. *Plowden*, 424.

(a) See *Bacon's Abridgement*, Amendment, B. *Theol. Dig. Lib.* 16, s. 15, 18. 2 Roll. Ab. 719, pl. 19. *Cooper vs. Frankling*, 1 Roll. R. 384. S. C. 3 Bulst. R. 148.

(b) See *Scot and Scot's case*, 4 *Leon.* R. 39. *Com. Dig. Abatement*, M.

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claim and title as propounded in his writ and proved at the trial. So was the case of Ablett *vs.* Skinner, 1 Sid. 229, where the ejectment was for *one fourth* part of a *fifth* part; and the plaintiff's title upon the trial was but one *third* part of a *fourth* of a *fifth* part; and yet it was held that he was entitled to recover according to his title. That case was recognized and fully confirmed in the case of Denn d. Burges *vs.* Purvis, 1 Burr. Rep. 326; where in ejectment the plaintiff sued for a *moiety* and recovered a *third*. Lord Mansfield relied on the analogous doctrine in cases of assise.

It may then be assumed as certain, that from the time of lord Hobart the general doctrine has been, that the defendant in any real action is entitled to recover less than he demands in his suit, whether he demands an entirety or an aliquot part, if the variance is not taken advantage of until after a verdict found on trial had. If, indeed, the matter is pleaded in abatement, it is fatal to the whole suit. So if it appears of record by the *confession* of the defendant in the course of the pleadings, the writ is abateable for the whole, if the tenant choose to take advantage of it before verdict. But if the parties go to trial upon the merits, and a verdict, general or special, is found of any part for the defendant, there the variance between the writ and the title, even though by the *confession* of the defendant upon the pleadings, is cured by the statute of amendments of 18 Elizabeth, ch. 14. This, then, being the state of the law at the time of the emigration of our ancestors, and the statute of Elizabeth being a remedial and not a penal law, and the general principle being that statutes made in amendment of the law before that period constitute a part of our common law; the court might, if it were necessary, resort to this principle to support the present suit. But such a resort is not necessary; because, in the first place, the present case is not one where the defect appears upon the *confession* of the party; but if at all, appears from facts proved at the trial upon the general issue. In the next place, the provisions of the judiciary act of 1789, ch. 20, sec. 32, upon the subject of amendments and jeofails, are far more extensive than the English statutes, and would justify the most comprehensive construction in

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favour of the defendant. And in the last place, the original nicety of the common law doctrine upon this subject, at least since the time of lord Hobart, seems to have given way (where the matter was not pleaded in abatement) to the doctrine of common sense. As far as we can trace it, it has been long established in England. Its existence in America has never been maintained by any positive decision in its favour. On the contrary, in Massachusetts, where real actions constitute the ordinary remedy for disseisins and ousters, it has been solemnly adjudged, upon a careful consideration of the English authorities, that the defendant may in all cases recover less than he sues for, whether he sues for an entirety or an aliquot part. So are the cases of *Dewy vs. Brown*, 2 Pick. Rep. 387; and *Somes vs. Skinner*, 3 Pick. Rep. 52; and the opinion of very able commentators upon this branch of the law(a). There is nothing in the case of *Green vs. Liter*, 8 Cranch, 229, 242, which trenches upon this doctrine. So far, indeed, as that case goes, it is favourable to the defendant.

I have not thought it necessary to go into a particular examination of the point, whether, if the variance between the defendant's title and his demand in his writ be apparent only by the finding of the jury upon the general issue, and not by the pleadings of the parties, or the confession of the defendant, the writ was abateable for the whole, upon the old doctrine of the common law. There is much reason to believe, as has been already intimated, that under such circumstances the variance was never fatal to a recovery pro tanto; and the modern doctrine in England is certainly in favour of a recovery. But whether it be so or not, independent of the statute of jeofails, that statute certainly cures the defect upon the principles already stated.

Upon the whole my opinion is, that this question ought to be certified in favour of the defendant.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the

(a) Jackson on Real Actions, 296. Stearns on Real Actions, 204.

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southern district of New York, and on the questions and points on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, in pursuance of the act of congress for that purpose made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court:

I. That although the count in the cause is for the entire right in the premises, the defendant may recover a less quantity than the entirety.

II. And under the second general point, the following answers are given to the specific questions:

1. If John Inglis, the defendant, was born before the 4th of July 1776, he is an alien, and disabled from taking real estate by inheritance.

2. If he was born after the 4th of July 1776, and before the 15th of September of the same year, when the British took possession of New York, he would not be under the like disability.

3. If he was born after the British took possession of New York, and before the evacuation on the 25th of November 1783, he would be under the like disability.

4. If the grand assise shall find, that Charles Inglis the father, and John Inglis the defendant, did, in point of fact, elect to become and continue British subjects, and not American citizens, the defendant is an alien, and disabled from taking real estate by inheritance.

III. The will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question, so as to defeat the defendant's right to recover, so far as her right or interest extended.

IV. The proceedings against Paul Richard Randall, as an absent debtor, passed his right or interest in the lands in question to, and vested the same in the trustees appointed under the said proceedings, so as to defeat the defendant's right to recover so far as his right or interest extended; unless the grand assise shall find, that the trusts vested in the trustees have been performed; and if so, the said proceedings will not defeat the defendant in any respect.

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V. The devise in the will of Robert Richard Randall of the lands in question is a valid devise, so as to divest the heir at law of his legal estate.

Whereupon it is ordered and adjudged by this court to be certified to the judges of the said circuit court of the United States for the southern district of New York:

I. That although the count in the cause is for the entire right in the premises, the defendant may recover a less quantity than the entirety.

II. And under the second general point, the following answers are given to the specific questions:

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V. The devise in the will of Robert Richard Randall of the lands in question, is a valid devise, so as to divest the heir at law of his legal estate.

All of which is accordingly hereby certified to the said circuit court.

Mr Webster, on a subsequent day of the term, submitted to the court an application in behalf of the defendant, for a re-argument of this case. He presented, as the ground of the application, a statement in writing signed by the counsel in the case, Mr Ogden and himself, representing "that the question in this cause, which arises on the construction of the will of Robert Richard Randall, is one, not only of great importance, but certainly of no small difficulty. The case was argued at a time when there were six judges on the bench. At the time of the decision there were but five judges living who had heard the cause; of these five, three were against the defendant upon the construction of the will, being a minority of the whole court. Under these circumstances, as counsel for the defendant, in a foreign country, the counsel feel it their duty to ask for a re-argument; the more particularly, as it appears from an affidavit now submitted to the court, that a sister of the defendant, who is now and long has been a feme covert, in case of a decision, upon the construction of the will, in favour of the defendant, is not subject to the disability of alienism, and may therefore maintain a suit to recover the property in dispute."

Mr Wirt objected to the re-argument, alleging, that should it be allowed, it would establish a precedent which would render every decision of the court uncertain; and incumber the court with heavier duties than it could perform. It was without example in the whole course of the court since its organization.

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Mr Chief Justice MARSHALL delivered the opinion of the Court.

The court have considered the application for a re-argument in this case. It must be a very strong case, indeed, to induce them to order a re-argument in any of the causes which have been once argued and decided in this court. The present case has been very fully considered, and the court cannot perceive any ground in the present application, to induce them to consent to the motion. It is therefore overruled(a).

(a) In the Appendix will be found the opinion of Mr Justice Story, prepared in the case of the Baptist Association *vs.* Hart's Executrix, 4 Wheat. 1, which, by his liberal kindness, the Reporter has been authorised to insert in this volume. It will be found to illustrate very fully some of the principles decided in this cause.

Ex PARTE TOBIAS WATKINS.

A petition was presented by Tobias Watkins for a habeas corpus for the purpose of inquiring into the legality of his confinement in the gaol of the county of Washington, by virtue of a judgment of the circuit court of the United States of the district of Columbia, rendered in a criminal prosecution instituted against him in that court. The petitioner alleged that the indictments under which he was convicted and sentenced to imprisonment, charge no offence for which the prisoner was punishable in that court, or of which that court could take cognizance; and consequently, that the proceedings were *cōram non iudice*.

The supreme court has no jurisdiction in criminal cases which could reverse or affirm a judgment rendered in the circuit court in such a case, where the record is brought up directly by writ of error. [201]

The power of this court to award writs of habeas corpus is conferred expressly on this court by the fourteenth section of the judicial act, and has been repeatedly exercised. No doubt exists respecting the power.

No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term used in the constitution is one which is well understood, and the judicial act authorises the court, and all the courts of the United States, and the judges thereof, to issue the writ "for the purpose of inquiring into the cause of commitment." [201]

The nature and powers of the writ of habeas corpus. [202]

A judgment in its nature concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world, as the judgment of this court would be. It is as conclusive on this court as on other courts. It puts an end to inquiry concerning the fact, by deciding it. [202]

With what propriety can this court look into an indictment found in the circuit court, and which has passed into judgment before that court? We have no power to examine the proceedings on a writ of error, and it would be strange, if under colour of a writ to liberate an individual from an unlawful imprisonment, the court could substantially reverse a judgment which the law has placed beyond its control. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. [203]

The circuit court for the district of Columbia is a court of record, having general jurisdiction over criminal cases. An offence cognizable in any court is cognizable in that court. [203]

If the offence be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offence charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of its jurisdiction, whether its judgment be for or against the prisoner. The judgment is equally binding in one case and in the other, and must remain in

[*Ex parte Tobias Watkins.*]

full force, unless reversed regularly by a superior court capable of reversing it. If this judgment is obligatory, no court can ever look behind it. [208]

Had any offence against the laws of the United States been in fact committed, the circuit court for the district of Columbia could take cognizance of it. The question whether any offence was committed, or was not committed; that is, whether the indictment did or did not show that an offence had been committed, was a question which this court was competent to decide. If its judgment was erroneous, a point which this court does not determine, still it is a judgment; and until reversed, cannot be disregarded. [208]

It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown on the pleadings, are yet binding on all the world, and that this apparent want of jurisdiction can avail the party only on a writ of error. The judgment of the circuit court in a criminal case is of itself evidence of its own legality, and requires for its support no inspection of the indictment on which it is founded. The lay trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. This court cannot usurp that power by the instrumentality of a writ of habeas corpus. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied. [207]

The cases of the United States *vs.* Hamilton, 3 Dall. Rep. 17; *Ex parte Burford*, 3 Cranch's Rep. 447; *Ex parte Bollman and Swartwout*, 4 Cranch; and *Ex parte Kearney*, 7 Wheat. 89; examined. [207]

THIS case came before the court on a petition for a habeas corpus, on the relation of Tobias Watkins, setting forth that at May term 1829 of the circuit court of the district of Columbia, in the county of Washington, certain presentments were found against him; upon three of which trials were had, and verdicts passed against him; upon which judgments were pronounced, purporting to condemn him to the payment of certain pecuniary fines and costs, and certain terms of imprisonment for the supposed offences therein. For the nature and terms of the indictments, and of the convictions and judgments thereon, the petition referred to the same. Copies and exemplifications of the records of the proceedings were annexed to the petition.

The petition proceeded to state, that, immediately on the rendition of the judgments, and in the pretended pursuance and execution of the same, the petitioner was, on the 14th of August 1829, committed to the common gaol of Washington county, in which he has since been confined, under colour and pretence of the authority, force, and effect of the said indictments; that he is well advised by counsel that the said convictions and judgments are illegal and wholly void upon

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their faces, and give no valid authority or warrant whatever for his commitment and imprisonment; that the indictments do not, nor does any one of them charge or import any offence at common law whatever, cognizable in the course of criminal judicature, and especially no offence cognizable or punishable by the said circuit court; and that his imprisonment is wholly unjust, and without any lawful ground, warrant or authority whatever.

The petitioner prays the benefit of the writ of habeas corpus, to be directed to the marshal of the district of Columbia, in whose custody, as keeper of the gaol of the district, the petitioner is, commanding him to bring the body of the petitioner before the court, with the cause of his commitment; and especially commanding him to return with the writ the record of the proceedings upon the indictments, with the judgments thereupon; and to certify whether the petitioner be not actually imprisoned by the supposed authority, and in virtue of the said judgment.

The first indictment referred to in the petition, charged the petitioner as fourth auditor of the treasury of the United States, and as such having assigned to him the keeping of the accounts of the receipts and expenditures of the public moneys of the United States in regard to the navy department; with having obtained for his private use the sum of seven hundred and fifty dollars, the money of the United States, by means of a draft for that sum on the navy agent of the United States at New York, which draft was drawn by him in the city of Washington, in favour of C. S. Fowler, on the navy agent at New York, and negotiated in the city of Washington on the 16th of January 1828; the said sum of money having been by him represented to the secretary of the navy as required by the navy agent for the uses of the United States, and so represented in a requisition made to the navy agent for a warrant on the treasury of the United States for the amount of the draft, with other sums included in the requisition.

The second indictment charged the petitioner with having received from the navy agent of the United States at New York, the sum of three hundred dollars, money of the United

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States, by means of fraudulent misrepresentations made to the navy agent, contained in a letter addressed to him on the 8th of October 1827, in which it was falsely stated, that the said sum of three hundred dollars was required for the use of the United States; and that the same was so obtained from the navy agent, by a draft on him in favour of C. J. Fowler, by whom the money was paid to the petitioner, on his having negotiated the draft.

The third indictment charged the petitioner with having procured to be drawn from the treasury of the United States the sum of two thousand dollars, by means of a requisition from the secretary of the navy; a blank requisition left by that officer in his department having, on the representation of the petitioner that the same was required for the public service by the navy agent at Boston, been filled up for this purpose; and for which he drew and negotiated drafts in the city of Washington, at different times, in favour of C. J. Fowler, in different sums amounting to two thousand dollars, and appropriated the same to his own use.

Messrs Jones and Coxe moved for a rule on the United States, to show cause why a habeas corpus should not issue, and proposed that the argument should take place on the motion upon all the points involved in the case. Mr Berrien, attorney general, objected to an argument on the motion. He stated that he was prepared to go into the argument on the return of the rule, but was not willing to do so on the motion.

The counsel for the petitioner observed, that in Kearney's case, 7 Wheat. the argument took place on the motion; and, as in this case the petition brought up the indictments and the judgments of the circuit court, the whole matter was now fully before the court.

Mr Chief Justice Marshall said, that the counsel for the petitioner and the attorney general might arrange among themselves as they thought proper when the argument should come on, either on the motion or the return. This not having been done, the rule was awarded returnable on the following motion day.

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On the return of the rule, Mr Coxe and Mr Jones for the petitioner contended, that no offence was charged in the indictments which was within the jurisdiction of the circuit court for the county of Washington, and therefore all the proceedings of that court were nullities and void.

1. All proceedings of a court beyond its jurisdiction are void. *Wise vs. Withers*, 3 Cranch, 331, 1 Peters's Condensed Rep. 552. *Rose vs. Himely*, 4 Cranch, 241, 268, 552. *Doe vs. Harden*, 1 Paine's Rep. 55, 58, 59.

2. In a case where a court acting beyond its jurisdiction has committed a party to prison, a *habeas corpus* is the proper remedy, and affords the means of trying the question. 3 Cranch, 448, 1 Peters's Condensed Rep. 594. *Bollman vs. Swartwout*, 4 Cranch, 75. *Kearney's case*, 7 Wheat. 88.

3. The writ does not issue of course, but the party must show that he is imprisoned by a court having no jurisdiction. 1 Chitty's Crim. Law, 124, 125. 7 Wheat. 88. A *habeas corpus* is a proper remedy for revising the proceedings of a court in a criminal case. 1 Chitty's Crim. Law, 180.

It was argued for the petitioner, that it has been decided in many cases, that a writ of *habeas corpus* may issue so as to make its action equivalent to that of a writ of error. 1 Chit. Crim. Law, 180.

The circuit court is a court of general criminal jurisdiction in cases within the local law, and within the law of Maryland. What is the effect of the clause of the act of congress establishing this court? It is to give it cognizance of "all offences;" but this does not mean that extraordinary powers are given to make new offences, and to punish all acts deemed offences. Offences are the violations of known and established local laws. The statute means offences against the laws of the United States in their sovereignty, and against the local laws of the district.

For the purposes of this inquiry it is immaterial whether the circuit court is or is not of limited jurisdiction. However extended its jurisdiction may be, it has defined limits, and these restrain it.

Suppose the court should entertain jurisdiction of cases

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certainly not criminal, would not a decision in such a case be a nullity? As if on the face of an indictment an act which is of a civil nature should be made criminal. The court is limited to offences committed within its jurisdiction. Should it take cognizance of an act done in England, would not this court interfere?

It is admitted that the judgment of a court of competent jurisdiction is conclusive, when the case is one properly submitted to the operation of that jurisdiction. But it is not sufficient to say that its jurisdiction is general; it should also appear it had jurisdiction of the offence charged. Cited *Rose vs. Himely*, 5 Cranch, 313. *Griffith vs. Frazier*, 8 Cranch, 9.

It is asked whether this court will look into any criminal case which has passed under the judgment of the circuit court. Suppose a sentence imposed not authorised by law; would not this court interfere by its writ of habeas corpus?

It is not contended that every excess of jurisdiction is within the principle claimed. There is a difference between a rule which is reasonable, and that which goes into extravagance. It may not be defined, but it can be felt; and this is a case where this rule can apply. The position that the decision of an inferior court of the United States in a criminal case cannot be inquired into unless there is an appellate jurisdiction in such cases, goes too far; and runs into the argumentum in absurdum.

In all the cases which have come before this court, in which a writ of habeas corpus has been applied for, the decision has been in favour of the jurisdiction. There has been enough shown here in this preliminary question to authorise the writ, as the only inquiry is, whether the judgment of the circuit court is conclusive upon all the matters before the court.

The counsel for the petitioner proceeded to argue at large upon authorities that the offences charged in the indictments were not cognizable in the circuit court. As this point was not noticed in the opinion of the court, the argument is omitted. They cited 7 Cranch, 32. 1 Wheat. 415. 1 Gall.

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488. 2 East, 814. 2 Maule and Selw. 378. 4 Wheat. 405, 424, 430, 410, 416, 427. 1 Cranch, 164.

The attorney general denied that it was competent for this court to revise the proceedings of the circuit court in a criminal case, or to award a habeas corpus to bring into revision such proceedings.

No such case was to be found since the organization of the court; and as writs of error and appeals are expressly limited to cases which are not criminal, the issuing of such a writ, and for such a purpose, would be contrary to law.

He contended, that the case of *Bollman vs. Swartwout* was not an authority for the claim of the petitioner. That was a case of bail, and not a case in which the judgment of a court had passed. In *Kearney's* case the writ of habeas corpus was refused; the petitioner being in confinement for contempt, which was considered equivalent to a sentence of the court.

It is now to be decided in the case before the court, whether they will, through the means of a habeas corpus, revise the sentence of an inferior court in a criminal case, so as to determine whether it had jurisdiction of the offence charged in an indictment found in that court.

The petition asserts, 1. That no offence is charged in the indictment cognizable by the law of Maryland.

2. That no offence is charged which is cognizable by the laws of the United States.

As to the first, if it is competent to this court to examine the point, the whole case of the petition is open, as the circuit court is said to have erred in deciding that the offence was cognizable by it. The circuit court of the district of Columbia has jurisdiction, such as is possessed by all other circuit courts of the United States; and it has also general jurisdiction of offences committed in the district. In the legitimate exercise of this jurisdiction to decide what is an offence, it is said to have exceeded its jurisdiction. By what authority can this decision of a court of general, final, criminal jurisdiction, be re-examined here? The court below has decided that the facts of the case amount to a fraud on the

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government, committed by false pretences. It may be they have erred in their judgment; but the error cannot be revised here. They have jurisdiction to decide that the offence was committed in the district, and they have so decided. The power of the court is, 1. To try the offender. 2. To determine what the offence is. 3. To punish after conviction. These are exclusive and final powers.

There is no power or authority in this court to re-examine a decision of a circuit court as to its jurisdiction in a criminal case. The proposition that the decisions of a court in a case beyond its jurisdiction are void, although true in the abstract, is practically false. Such decisions must stand, unless there is power in another court to reverse them. The truth of this is maintained in civil as well as criminal cases.

It must appear that there is jurisdiction in a superior court to award a writ of error, or a habeas corpus, which may bring up the question; not alone that the judgment of the court was erroneous.

If this court possesses such powers, it must be derived from one of three sources: 1. From the act of congress appropriating and regulating the powers of this court. No powers are given by the act to revise the proceedings of the circuit court in criminal cases. 2. From the powers of this court as the supreme court, to exercise supervision over all inferior courts. In the case of *Bollman vs. Swartwout*, the court have said they have no such powers. 3. Can those powers be derived from the power to issue writs of habeas corpus, and by this to revise the judgments of inferior judicatures exercising criminal jurisdiction?

Congress have carefully guarded against this: they have given appellate powers in civil, admiralty and maritime cases, and have refused them in criminal cases. It cannot be supposed that when thus refused, they can be exerted under the writ of habeas corpus, which this court is authorised to issue. There are many cases for the employment of this writ, without claiming for it the rights asserted to belong to it by the counsel for the petitioner.

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Mr Chief Justice MARSHALL delivered the opinion of the court.

This is a petition for a writ of *habeas corpus* to bring the body of Tobias Watkins before this court, for the purpose of inquiring into the legality of his confinement in gaol. The petition states that he is detained in prison by virtue of a judgment of the circuit court of the United States, for the county of Washington, in the district of Columbia, rendered in a criminal prosecution carried on against him in that court. A copy of the indictment and judgment is annexed to the petition, and the motion is founded on the allegation that the indictment charges no offence for which the prisoner was punishable in that court, or of which that court could take cognizance; and consequently that the proceedings are *coram non judice*, and totally void.

This application is made to a court which has no jurisdiction in criminal cases (3 Cranch, 169;) which could not revise this judgment; could not reverse or affirm it, were the record brought up directly by writ of error. The power, however, to award writs of *habeas corpus* is conferred expressly on this court by the fourteenth section of the judicial act, and has been repeatedly exercised. No doubt exists respecting the power; the question is, whether this be a case in which it ought to be exercised. The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently the writ ought not to be awarded, if the court is satisfied that the prisoner would be remanded to prison.

No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term is used in the constitution, as one which was well understood; and the judicial act authorises this court, and all the courts of the United States, and the judges thereof, to issue the writ "for the purpose of inquiring into the cause of commitment." This general reference to a power which we are required to exercise, without any precise definition of that power, imposes on us the necessity of making some inquiries into its use,

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Mr Chief Justice MARSHALL delivered the opinion of the Court.

The court have considered the application for a re-argument in this case. It must be a very strong case, indeed, to induce them to order a re-argument in any of the causes which have been once argued and decided in this court. The present case has been very fully considered, and the court cannot perceive any ground in the present application, to induce them to consent to the motion. It is therefore overruled(a).

(a) In the Appendix will be found the opinion of Mr Justice Story, prepared in the case of the Baptist Association *vs.* Hart's Executrix, 4 Wheat. 1, which, by his liberal kindness, the Reporter has been authorised to insert in this volume. It will be found to illustrate very fully some of the principles decided in this cause.

Ex PARTE TOBIAS WATKINS.

A petition was presented by Tobias Watkins for a habeas corpus for the purpose of inquiring into the legality of his confinement in the gaol of the county of Washington, by virtue of a judgment of the circuit court of the United States of the district of Columbia, rendered in a criminal prosecution instituted against him in that court. The petitioner alleged that the indictments under which he was convicted and sentenced to imprisonment, charge no offence for which the prisoner was punishable in that court, or of which that court could take cognizance; and consequently, that the proceedings were *cōrām non iudice*.

The supreme court has no jurisdiction in criminal cases which could reverse or affirm a judgment rendered in the circuit court in such a case, where the record is brought up directly by writ of error. [201]

The power of this court to award writs of habeas corpus is conferred expressly on this court by the fourteenth section of the judicial act, and has been repeatedly exercised. No doubt exists respecting the power.

No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term used in the constitution is one which is well understood, and the judicial act authorises the court, and all the courts of the United States, and the judges thereof, to issue the writ "for the purpose of inquiring into the cause of commitment. [201]

The nature and powers of the writ of habeas corpus. [202]

A judgment in its nature concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world, as the judgment of this court would be. It is as conclusive on this court as on other courts. It puts an end to inquiry concerning the fact, by deciding it. [202]

With what propriety can this court look into an indictment found in the circuit court, and which has passed into judgment before that court? We have no power to examine the proceedings on a writ of error, and it would be strange, if under colour of a writ to liberate an individual from an unlawful imprisonment, the court could substantially reverse a judgment which the law has placed beyond its control. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. [203]

The circuit court for the district of Columbia is a court of record, having general jurisdiction over criminal cases. An offence cognizable in any court is cognizable in that court. [203]

If the offence be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offence charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of its jurisdiction, whether its judgment be for or against the prisoner. The judgment is equally binding in one case and in the other, and must remain in

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ejectment, rendered against her in the circuit court of the United States for the district of New Jersey. An inquisition taken under the confiscating acts of New Jersey, had been found against her, on which a judgment of condemnation had been rendered by the inferior court of common pleas for the county of Hunterdon. The land had been sold under this judgment of condemnation, and this ejectment was brought against the purchaser. The title of the plaintiff being resisted under those proceedings, his counsel prayed the court to instruct the jury that they ought to find a verdict for him. The court refused the prayer, and did instruct the jury to find for the defendants. An exception was taken to this direction, and the cause brought before this court by writ of error. On the argument the counsel for the plaintiff made two points. 1. That the proceedings were erroneous. 2. That the judgment was an absolute nullity. He contended that the individual against whom the inquest was found, was not comprehended within the confiscating acts of New Jersey. Consequently, the justice who took the inquisition had no jurisdiction as regarded her. He contended also that the inquisition was entirely insufficient to show that Grace Kemp, whose land had been condemned, was an offender under those acts. He then insisted that the tribunal erected to execute these laws, was an inferior tribunal, proceeding by force of particular statutes out of the course of the common law; it was a jurisdiction limited by the statute, both as to the nature of the offence, and the description of persons over whom it shoud have cognizance. Every thing ought to have been stated in the proceedings which was necessary to give the court jurisdiction, and to justify the judgment of forfeiture. If the jurisdiction does not appear upon the face of the proceedings, the presumption of law is, that the court had not jurisdiction, and the cause was *coram non judice*; in which case no valid judgment could be rendered.

The court said, that however clear it might be in favour of the plaintiff on the first point, it would avail him nothing unless he succeeded on the second.

The court admitted the law respecting the proceedings

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of inferior courts in the sense in which that term was used in the English books; and asked, "was the court in which this judgment was rendered an inferior court in that sense of the term?"

"All courts from which an appeal lies, are inferior courts in relation to the appellate courts, before which their judgment may be carried; but they are not therefore inferior courts in the technical sense of those words. They apply to courts of special and limited jurisdiction, which are erected on such principles that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed; but this court is not prepared to say that they are absolute nullities, which may be totally disregarded."

The court then proceeded to review the powers of the courts of common pleas in New Jersey. They were courts of record, possessing general jurisdiction in civil cases, with the exception of suits for real property. In treason, their jurisdiction was over all who could commit the offence. . . .

After reviewing the several acts of confiscation, the court said, that they could not be fairly construed to convert the courts of common pleas into courts of limited jurisdiction. They remained the only courts capable of trying the offences described by the laws.

In the particular case of Grace Kemp, the court said, that "the court of common pleas was constituted according to law; and if an offence had been in fact committed, the accused was amenable to its jurisdiction, so far as respected her property in the state of New Jersey. The question whether this offence was or was not committed, that is, whether the inquest, which is substituted for a verdict on an indictment, did or did not show that the offence had been committed, was a question which the court was competent to decide. The judgment it gave was erroneous; but it is a judgment, and, until reversed, cannot be disregarded."

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This case has been cited at some length, because it is thought to be decisive of that now under consideration.

Had any offence against the laws of the United States been in fact committed, the circuit court for the district of Columbia could take cognizance of it. The question whether any offence was, or was not committed, that is, whether the indictment did or did not show that an offence had been committed, was a question which that court was competent to decide. If its judgment was erroneous, a point which this court does not determine, still it is a judgment, and, until reversed, cannot be disregarded.

In *Skillern's Executors vs. May's Executors*, 6 Cranch, 267, a decree pronounced by the circuit court for the district of Kentucky had been reversed, and the cause was remanded to that court, that an equal partition of the land in controversy might be made between the parties. When the cause again came on before the court below, it was discovered that it was not within the jurisdiction of the court; whereupon the judges were divided in opinion, whether they ought to execute the mandate, and their division was certified to this court. This court certified, that the circuit court is bound to execute its mandate, "although the jurisdiction of the court be not alleged in the pleadings." The decree having been pronounced, although in a case in which it was erroneous for want of the averment of jurisdiction, was nevertheless obligatory as a decree.

The case of *Williams et al. vs. Armroyd et al.* 7 Cranch, 423, was an appeal from a sentence of the circuit court for the district of Pennsylvania, dismissing a libel which had been filed for certain goods which had been captured and condemned under the Milan decree. They were sold by order of the governor of the island into which the prize had been carried, and the present possessor claimed under the purchaser. It was contended, that the Milan decree was in violation of the law of nations, and that a condemnation professedly under that decree could not change the right of property. This court affirmed the sentence of the circuit court, restoring the property to the claimant, and said "that

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the sentence is avowedly made under a decree subversive of the law of nations, will not help the appellant's case in a court which cannot revise, correct, or even examine that sentence. If an erroneous judgment binds the property on which it acts, it will not bind that property the less, because its error is apparent. Of that error, advantage can be taken only in a court which is capable of correcting it."

The court felt the less difficulty in declaring the edict under which the condemnation had been made to be "a direct and flagrant violation of national law," because the declaration had already been made by the legislature of the union. But the sentence of a court under it was submitted to, as being of complete obligation.

The cases are numerous, which decide that the judgments of a court of record having general jurisdiction of the subject, although erroneous, are binding until reversed. It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world; and that this apparent want of jurisdiction can avail the party only on a writ of error. This acknowledged principle seems to us to settle the question now before the court. The judgment of the circuit court in a criminal-case is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. We cannot usurp that power by the instrumentality of the writ of habeas corpus. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied.

The counsel for the petitioner contend, that writs of habeas corpus have been awarded and prisoners liberated in cases similar to this.

In the *United States vs. Hamilton*, 3 Dall. 17, the prisoner was committed upon the warrant of the district judge of Pennsylvania, charging him with high treason. He was, after much deliberation, admitted to bail. This was a proceeding contemplated by the thirty-third section of the judicial act, which declares that in cases where the punishment

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may be death, bail shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of the district court.

In the case *Ex parte Burford*, 3 Cranch, 447, the prisoner was committed originally by the warrant of several justices of the peace for the county of Alexandria. He was brought by a writ of habeas corpus before the circuit court, by which court he was remanded to gaol, there to remain until he should enter into recognizance for his good behaviour for one year. He was again brought before the supreme court on a writ of habeas corpus. The judges were unanimously of opinion that the warrant of commitment was illegal, for want of *stating some good cause certain supported by oath*. The court added that, "if the circuit court had proceeded, *de novo*, perhaps it might have made a difference; but this court is of opinion that that court has gone only on the proceedings before the justices. It has gone so far as to correct two of the errors committed, but the rest remain." The prisoner was discharged.

In the case of *Bollman vs. Swartwout*, the prisoners were committed by order of the circuit court, on the charge of treason. The habeas corpus was awarded in this case on the same principle on which it was awarded in the case of 3 Dall. 17. The prisoners were discharged, because the charge of treason did not appear to have been committed. In no one of these cases was the prisoner confined under the judgment of a court.

The case *Ex parte Kearney*, 7 Wheat. 39, was a commitment by order of the circuit court for the district of Columbia, for a contempt. The prisoner was remanded to prison. The court, after noticing its want of power to revise the judgment of the circuit court in any case where a party had been convicted of a public offence, asked, "if then this court cannot directly revise a judgment of the circuit court in a criminal case, what reason is there to suppose that it was intended to vest it with the authority to do it indirectly?" The case *Ex parte Kearney* bears a near resemblance to that under consideration.

The counsel for the prisoner rely, mainly, on the case of

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Wise *vs.* Withers, 3 Cranch, 330. This was an action of trespass *vi et armis*, for entering the plaintiff's house and taking away his goods. The defendant justified as collector of the militia fines. The plaintiff replied that he was not subject to militia duty, and on demurrer this replication was held ill. This court reversed the judgment of the circuit court, because a court martial had no jurisdiction over a person not belonging to the militia, and its sentence in such a case being *coram non judice*, furnishes no protection to the officer who executes it.

This decision proves only that a court martial was considered as one of those inferior courts of limited jurisdiction, whose judgments may be questioned collaterally. They are not placed on the same high ground with the judgments of a court of record. The declaration, that this judgment against a person to whom the jurisdiction of the court could not extend, is a nullity; is no authority for inquiring into the judgments of a court of general criminal jurisdiction, and regarding them as nullities, if, in our opinion, the court has misconstrued the law, and has pronounced an offence to be punishable criminally, which, as we may think, is not so.

Without looking into the indictments under which the prosecution against the petitioner was conducted, we are unanimously of opinion that the judgment of a court of general criminal jurisdiction justifies his imprisonment, and that the writ of *habeas corpus* ought not to be awarded.

On consideration of the rule granted in this case, on a prior day of this term, to wit, on Tuesday the 26th of January of the present term of this court, and of the arguments thereupon had; it is considered, ordered and adjudged by this court, that the said rule be, and the same is hereby discharged, and that the prayer of the petitioner for a writ of *habeas corpus* be, and the same is hereby refused.

JAMES BOYCE'S EXECUTORS, APPELLANTS vs. FELIX GRUNDY, APPELLEE.

The courts of the United States have equity jurisdiction to rescind a contract on the ground of fraud, after one of the parties to it has been proceeded against on the law side of the court, and a judgment has been obtained against him for a part of the money stipulated to be paid by the contract.

This court has been often called upon to consider the sixteenth section of the judiciary act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy.

It is not enough that there is a remedy at law: it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. [215]

It cannot be doubted that reducing an agreement to writing is in most cases an argument against fraud; but it is very far from a conclusive argument. The doctrine will not be contended for, that a written agreement cannot be relieved against on the ground of false suggestions. [219]

It is not an answer to an application to a court of chancery for relief in rescinding a contract, to say that the fraud alleged is partial, and might be the subject of compensation by a jury. The law, which abhors fraud, does not permit it to purchase indulgence, dispensation, or absolution. [220]

APPEAL from the decree of the circuit court of West Tennessee.

A bill in chancery was filed in that court by the appellee, Felix Grundy, against the appellants, the executors of James Boyce, to enjoin a judgment at law which they had obtained against him for four thousand seven hundred dollars, and to rescind a contract made between James Boyce and himself, on the 3d of July 1818, by which Boyce sold and agreed to convey to the complainant, Grundy, nine hundred and fifty acres or arpents of land on the Homochito river, in the state of Mississippi, and for which Grundy agreed to pay him twenty thousand dollars; two thousand of which were to be paid in hand, and the balance in yearly instalments of two thousand dollars. A deed of general warranty was, by the written agreement of the partners, to be made to the purchaser in four years.

Grundy having failed to pay the amount of the instal-

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ments due January 1820 and 1821, Boyce's executors commenced suit upon the contract for the two first instalments, in the circuit court for the district of West Tennessee, and recovered judgment for the same with interest. On the 30th of August 1823, Grundy filed his bill, praying an injunction against the judgment at law, and a rescission of the contract.

The grounds of equity stated in the bill and relied on, were the fraudulent and false representations of Boyce, in making the sale of the land.

1. In regard to an island in the river, part of the land purchased, containing two hundred and sixty-five acres, not being subject to inundation, except a very small part, easily prevented ; and of the quality of the land on said island.

2. In showing and selling a body of good and level land, as part of the tract, which is *not* included within its limits. And representing that a quantity of bad and hilly ground was not within the tract, which is included.

3. In representing that he had a good title to the land ; having no title, and not being able to make a good right.

The answer of the defendants in the circuit court denies the allegations charging fraud and misrepresentation by James Boyce, and avers Grundy's information as to the true state of the title, the quantity and quality of the lands ; and alleges that they have been prevented from obtaining the legal title by the failure of Grundy to pay the instalments due upon the contract, and which were necessary to enable them to obtain a conveyance.

Depositions were taken on the part of the complainant and the defendants ; which with other testimony were exhibited in the circuit court on the hearing of the cause. The testimony exhibited on the part of the complainant in that court, fully established the allegations in the bill, to the satisfaction of the court. The whole evidence is referred to, and the facts of the case are sufficiently stated in the opinion of this court.

The circuit court perpetuated the injunction, and rescinded the contract between Boyce and Grundy ; and decreed that

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the money paid by the complainant to Boyce should be refunded with interest. The defendants appealed to this court.

Messrs Ogden and Wickliffe, for the appellants, contended:

1. That the charge of fraud and misrepresentation as set forth in the bill, in reference to the title, quantity, boundary, and overflowing of the land, is not sustained by proof.

2. That the court below erred, in decreeing a rescission of the contract, upon the grounds assumed in the decree. That the court erred in refusing to continue the cause for the reasons stated in the exceptions filed by the defendants. The court erred in admitting, as evidence in this cause, the papers and parts of depositions referred to in the several bills of exceptions.

3. The testimony in this cause, the matters of fact involved, were of a character which imperatively called upon the chancellor to direct an issue at law, to try the controverted facts.

4. The court should have referred the cause to a commissioner, with directions to report upon the title.

5. The decree should have been interlocutory, and not final. Time should have been given defendants to make the title and tender it, upon the payment or tender of the purchase money.

The counsel for the appellants, after full argument on the facts, as to the law of the case, said, that the bill filed in the circuit court was to rescind a contract on the ground of fraud. In all cases of fraud, courts of equity in England, and chancery courts in the United States, have concurrent jurisdiction with courts of law. Mad. Chan. 258. 6 Johns. Rep. 110. It is a well settled principle of law that fraudulent representations will vitiate any contract. 1 Comyn on Contracts, 38. In case a contract is obtained by such representations, it will be vitiated and destroyed in its binding force. If money has been paid under such misrepresentations, it may be recovered back. If a suit be brought at law upon the contract, the fraudulent representations may

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be set up as an effectual defence at law. If the vendee takes possession of the property, he may abandon it and consider the contract as not binding on him.

Thus there is at law an adequate and a competent remedy, and full relief can be obtained at law from the effects of such a contract.

Has then a court of the United States jurisdiction in the case? By the judiciary act, the equity powers given to the courts of the United States are not to be exercised when there is a full and adequate relief at law.

2. Fraud cannot be alleged in most cases where the agreement has been reduced to writing. It is an argument of great force against fraud, Sugden on Vendors, 129, upon the principle that all the allegations and representations of the parties will be presumed to have been embodied in the writing. 4 Taunt. 785.

3. They also contended that after a judgment has been obtained in a suit in which the alleged fraud might have been set up as a defence, no injunction will lie, 3 Merivale's Rep. 225, 226. Chit. on Contracts, 113. Cited also, Sugden on Vendors, 129. To show that the case was not one for a court of equity, were cited, Hepburn *vs.* Dundas, 1 Wheat. 179. 5 Cranch, 502. Morgan *vs.* Morgan, 2 Wheat. 290. Dunlop *vs.* Dunlop, 12 Wheat. 576. 10 Ves. 144. 3 Bro. Ch. Cases, 73. 16 Ves. 83. 9 Ves. 21. 1 Bro. Ch. Cases, 546. 1 Ves. & Beames, 355, 356. 1 Barn. & Cress. 623. 5 Dowling & Riland, 490.

Mr Isaacks and Mr White, for the appellee, contended, that the evidence on the record fully established the allegations of fraud in the bill, and that the decree of the circuit court was in harmony with the weight of that evidence. A fraud had been committed both as to the quality, the quantity, the situation, and the title of the land.

They argued that the case was one which came fully within the jurisdiction of a court of chancery. The construction of the act of congress, which would limit the chancery powers of the courts of the United States to cases only in which there is no concurrent legal remedy, is contrary to that

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which it has constantly received since the organization of the court under that law.

The case made out in the complainant's bill is one peculiarly within the jurisdiction of a court of equity; and the relief which such a court can afford, is the only adequate means to protect the complainant from gross injustice and fraud; to restore him to the situation in which he was before the contract was made. Without this remedy he would be exposed to a multitude of suits, and subjected to heavy expenses, for which he could not be reimbursed. Fraud and trusts are peculiarly within the command of the chancery courts. In support of these principles, the counsel for the appellee cited, 1 Mad. Chan. 262. 3 Cranch, 280. 9 Ves. 21. 1 Jacob & Walker, 19. 5 Johns. Ch. Rep. 174. 2 Cowen, 129. 2 Johns. Ch. Rep. 596. 6 Munford, 283. 4 Price's Rep. 131.

Mr Justice JOHNSON delivered the opinion of the Court.

This is an appeal from the decree of the circuit court of West Tennessee, rendered in a case in which the appellee was complainant.

The bill was filed to obtain the rescission of an agreement entered into on the 3d of July 1818, between James Boyce, the appellants' testator and deviser, and the complainant, for the sale of a tract of land lying on the Homochito river, in the state of Mississippi.

The grounds set forth in the bill are fraudulent misrepresentations.

1. As to the testator's title to the land. 2. As to the locality of the land. 3. As to the liability of the land to inundation. 4. As to the general description of the character and quality of part of the land not examined by complainant.

We have weighed the allegations of fraud contained in the bill, and are well satisfied that they are material, and such as entitle the complainant to relief if substantiated.

We have also considered the evidence introduced by the complainant, and compared it with the rebutting testimony

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introduced by the appellants, and are of opinion that the testimony in support of complainant's allegations is full to the purpose of sustaining his bill, and the credibility of his witnesses fully established, wherever it has been necessary; so that in those points in which it has been contradicted by the appellants' witnesses, we cannot avoid giving credit to that of the complainant.

The decree below must therefore be sustained, unless the appellants can prevail upon some legal ground which will except this case from the general rules on this subject. The first and principal ground taken is, that the court of law was competent to give relief, and that this court should refuse relief, as well on the general principle as affirmed in the judiciary act, as because:

1. That the complainant was not prompt in insisting upon the fraud as soon as discovered; and
2. Because he did not avail himself of it in a plea to the action at law.

This court has been often called upon to consider the sixteenth section of the judiciary act of 1789, and as often, either expressly or by the course of its decisions, has held, that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity.

In the case before us, although the defence of fraud might have been resorted to, and ought to have been sustained in that particular suit, and I will add, would have greatly aided the complainant in a bill to rescind, yet it was obviously not an adequate remedy, because it was a partial one. The complainant would still have been left to renew the contest upon a series of suits; and that probably after the death of witnesses.

That he was bound to be prompt in communicating the fraud when discovered, and consistent in his notice to the opposite party of the use he proposed to make of the discovery, cannot be questioned. But we cannot concede to the

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appellants' counsel, that the complainant was chargeable with delay or inconsistency in the particulars.

In his bill he alleges that the fraud did not come to his knowledge until 1821, and that he forthwith gave notice to James Boyce, that he might resume possession of the premises, and receive the rents and profits, for that he would not comply with the contract; which notice he repeated to the appellants after Boyce's death.

It has been argued that the testimony establishes an earlier notice, and even a contemporaneous notice of the facts which the complainant alleges were concealed or misrepresented.

The misrepresentations relied upon are of two classes: those which relate to the land, and those which relate to the title.

As to the title; the case furnishes no ground for imputing to the complainant contemporaneous notice of the involved state it was in. The evidence of the fact of representation on this subject, rests chiefly on the deed and the letters from Port Gibson. From these it clearly appears, that so far as relates to the two hundred acres purchased from Ellis, the complainant could not, even at the time of sale, have been put on inquiries respecting the title. For the deed expressly imports that the whole land sold was comprised within the grant to Davis. With regard to the land actually comprised within the grant to Davis, if the agreement to make a present sale of land, for which there was to be made present and successive payments to a large amount within four years, does not imply a present title or a present power to sell, it certainly amounts to a representation, that at the end of four years the seller would be able to make a clear title.

But since, upon the discovery made at Port Gibson, the notice given by the complainant was not of an intention to rescind, but of a claim for a deduction pro rata, and since time is expressly given to the extent of four years to make title to the whole tract; we will not affirm that, in the absence of any proof of positive loss from want of title in the interval, if the party had been able to make title when the bill was filed, and had so answered, and duly set out the title

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to be tendered, that it would have been a case for relief. But the defendants in their answer go into an exposition of the only title they can offer, and that is so involved and imperfect, that a court of equity would not even refer it. If then the appellants were now before this court, under a bill for a specific performance, it is clear that they must be turned out of court, being incompetent on their part to fulfil the contract. The rules of law relating to specific performance and those applied to the rescission of contracts, although not identically the same, have a near affinity to each other.

Again, if the object of the complainant's bill had been confined to obtaining an injunction until he could receive from defendant a good title to the land; can it be doubted that where the cause of action at law is a covenant in the same deed which stipulates for such a title, that he would be enjoined until he made a title? And if so, how long is this state of suspense to be tolerated? The title was to be made in four years; this certainly amounts to a representation that he would be able to make title at that time; but twelve years have now elapsed, and still it is not pretended that a clear legal estate has been acquired.

In excuse for this, it is urged that the complainant committed the first fault; that had he been punctual in his payments, Boyce would have been able to procure to be executed to himself, a title that would have enabled him to comply with his agreement. But the state of his title is before us, and a mere tender of money was not sufficient to give him a legal estate. He must still have passed through the delays and casualties incident to a suit in equity, before he could have acquired such an estate as would have satisfied the just claims of the complainant. The case, however, furnishes a more conclusive answer to this argument. The two hundred acres not included in Davis's grant, valued at the average which complainant would have paid for all the good land actually contained within his purchase, would have satisfied every payment that fell due within the four years. This deduction he informed Boyce he would insist upon, and there is no evidence in the cause to make it clear that Boyce did not acquiesce in this agreement.

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It is argued, that of the defects in Payce's title the court could not be informed; that the complainant did not ask for a specific performance, and the defendants were not therefore called upon to set out their title. But by referring to the bill it will be seen that they are expressly called upon to set out their title, and in their answer undertake to do so, and in the effort, exhibit a title which he cannot deny is defective, but instead of setting out a title free from defects, content themselves with showing that the defects are not incurable.

With regard to the misrepresentations relating to the land, the only evidence by which it is attempted to fasten on the complainant a want of promptness and consistency in availing himself of the discovery when made, is that by which a knowledge at the time of the contract is supposed to be established. Of the witnesses from whom this evidence has been obtained, it is enough to say, that with the exception of Mr Poindexter, it is impossible to avoid putting their testimony out of the case. And Mr Poindexter's testimony, even without his subsequent examination, may, without any forced construction, be reconciled with that of the witnesses who testify to the representations made by Boyce at the time of the sale. It relates exclusively to the subject of inundation, and when the complainant spoke to this witness of the island's overflowing, he accompanied it with the assertion that the overflowing could be prevented by a levée at a small expense. This may well be confined to the representations received from Boyce, and does not necessarily imply a knowledge of its being subject to general inundation. Nor was the information received from Mr Poindexter on this subject of such a full and decided character as to amount to a communication of knowledge. It is said that it ought to have put him on inquiry; but he was in possession of Mr Boyce's positive assurances to the contrary, and had a right to rely upon that assurance without inquiry. The bill alleges the time of coming to his knowledge to have been that of the communication authorising the party to take possession, and the evidence is not sufficient to prove notice at any previous time.

The second ground on this head of the appellants' argument

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has been partly answered by the doctrine laid down upon the construction of the judiciary act, on the subject of the remedy at law. And so far as it relies on the adjudication quoted from Merivale, we think it unsustained. The position is, that an injunction to restrain proceeding on a judgment at law, will be refused by the court of equity to a party who had a defence at law and neglected to plead it. The doctrine of the case quoted, we conceive, has no bearing upon the present. The question there was upon a point of practice, whether a special injunction should issue instead of the common injunction; there was no question about the right to the latter, but the circumstances of the case were such, that the common injunction did not afford full relief to the party. The rule of practice as laid down by the court is, that the special injunction goes only in those cases in which, from their nature, the defendant can make no defence; such as judgments on warrants of attorney. This was not such a case, but the party went for an exception in his favour, grounded upon a state of facts which brought him within the reason of the rule. And it was in fact granted.

It has been farther argued for the appellants, that reducing the agreement to writing precludes a recurrence to all representations; and to establish this doctrine, a passage from Sugden has been quoted. It cannot be doubted that, in the language of the author, reducing an agreement to writing is, in most cases, an argument against fraud. But it is very far from a conclusive argument, as is previously shown by the same author on the same page. The doctrine will not be contended for, that a written agreement cannot be relieved against on the ground of false suggestions; and yet if the doctrine of this quotation were the rule, instead of an incident to it, such would be the consequence.

There is no attempt made here to vary the written agreement; the relief is sought upon the ground, that by false suggestions and immoral concealment, the party seeking relief was entrapped into an agreement in which he would not otherwise have involved himself. This is not denying that the agreement in the record was the agreement entered into,

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but insisting that it was vitiated by fraud, which vitiates every thing.

It has been further argued, that the misrepresentation, if at all established, was but of a personal character, and susceptible of compensation or indemnity, to be assessed by a jury.

On this there may be made several remarks; and first, that if the facts made out such a case, yet the law, which abhors fraud, does not incline to permit it to purchase indulgence, dispensation, or absolution.

Secondly, that although, locally, a misrepresentation may be partial, yet it may be vital in its effects upon the views and interests of the party affected by it. Such was the case of *Fulton vs. Roosevelt*.

But lastly, the evidence makes out a case very far removed from one of merely a partial character. North, south, east, and west, we find the misrepresentations influencing the estimate of the value of these premises. Indeed, if we are to believe the testimony of Randel M'Garwick; and its clearness, fulness and fairness speaks its own eulogium; a case of more general or more vital misrepresentation, can seldom occur, or a case of more absolute devotion to misplaced confidence. Not only for the qualities and incidents, but also for the lines, the representations of the seller were implicitly relied on, and certainly to the most important results as to the value of the property. M'Garwick proves that they were carried to a certain fence, which fence excluded a large knob, as it is called in that country, containing a considerable body of untillable and worthless land, and expressly told by Boyce that the fence was his line. Thus explicitly declaring that that body of bad land was not included in the land sold him, whereas in fact it was included; and in another direction where the land was fine, as if to make up the deficit in quantity to an experienced eye, he represents the land in view as being included within his survey, when in fact it was not all included. And suppose the utmost effect be given to the testimony of the appellants relative to the actual extent to which the island was subject to inundation; still it leaves wide ground for the charge of misrepresentation.

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The testimony is full to establish that, in several years, the whole has been overflowed. And the most favourable state of facts will leave from one hundred to one hundred and fifty acres, instead of fifteen or twenty, subject to this casualty in ordinary years. This, although partial in one sense, is total as to the diminution of the value of the whole. Compared with the representation proved, it certainly annihilates the very material consideration that it admitted of being prevented at a small expense, more especially as the chief injury was to be expected from the waters of the Mississippi.

In a purchase of nine hundred and fifty acres at twenty dollars an acre, such a discrepancy between facts and representations as would add thirty-three and a-third, or perhaps fifty per cent per acre to the cost, is not a case for mere compensation. And, if not a case for mere compensation, there was no controlling necessity to send the cause to a jury.

The decree must be affirmed with costs.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of West Tennessee, and was argued by counsel; on consideration whereof, it is ordered, and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby affirmed with costs.

THE PATAPSCO INSURANCE COMPANY, PLAINTIFFS IN ERROR vs.
JOHN COULTER, DEFENDANT IN ERROR.

Insurance on profits on board the ship Mary "at and from Philadelphia to Gibraltar and a port in the Mediterranean, not higher up than Marseilles, and from thence to Sonsonate in Guatemala, Pacific Ocean, with liberty of Guayaquil, the insurance to begin from the loading of the goods at Philadelphia, and to continue until the goods were safely landed at the said ports. The insurance, five thousand dollars, declared to be on profits, warranted to be American property, to be proved at Philadelphia only, valued at twenty thousand dollars." The vessel proceeded with a cargo of flour to Gibraltar, where the same was to be sold, and the proceeds invested at Marseilles in dry goods, to be sent from thence to Sonsonate or Guayaquil. While the vessel lay at Gibraltar, before the discharge of her cargo, she and her cargo were totally lost by fire. The evidence on the trial went to show, that with proper diligence on the part of the captain and crew, the fire might have been extinguished, and the vessel and cargo saved. Soon after the fire commenced, the captain called upon the crew to leave the ship, under apprehension from a small quantity of gunpowder on board; and after they left her she was boarded by other persons, who endeavoured without success to extinguish the flames, having, as was alleged, arrived too late. Evidence was given, intended to show that the fire originated from the carelessness of the captain. The circuit court refused to instruct the jury that if the fire proceeded from the carelessness or negligence of the captain, the insured could not recover. That court also refused to instruct the jury that if the fire originated from accident, or without any want of due care on the part of the master and crew, and if the jury should find that by reasonable and proper exertions the vessel and cargo might have been preserved by them, which they omitted, the assured could not recover. That court also refused to instruct the jury that the assured, having offered no evidence that the sales of the flour at Gibraltar would have yielded a profit, they were not entitled to recover. Held, that there was no error in these instructions.

What is barratry. Its definition. [280]

The British courts have adopted the safe and legal rule, in deciding that where the policy covers the risk of barratry, and fire is the proximate cause of the loss, they will not sustain the defence that negligence was the remote cause, and hold the assurers liable for the loss. [236]

The rule that a loss, the proximate cause of which is a peril insured against, is a loss within the policy, although the remote cause may be negligence of the master or mariners, has been affirmed in several successive cases in the English courts. [287]

It seems difficult to perceive, if profit be a mere excrescence of the principal, as some judges have said, or identified with it, as has been said by others, why the loss of the cargo should not carry with it the loss of the profits. Proof that profits would have arisen on the voyage, in order to recover on a policy on profits, is not required if the cargo has been lost. [241]

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ERROR to the circuit court of the district of Maryland.

This action was instituted in the circuit court on a policy of insurance, executed by the plaintiffs in error, on profits upon goods on board the ship *Nancy*, "at and from Philadelphia to Gibraltar and a port in the Mediterranean, not higher up than Marseilles, and at and from thence to Sonsonate, in the province of Guatemala, Pacific ocean, with the liberty of Guayaquil : beginning the adventure upon the said goods, from the loading thereof on board the said vessel at Philadelphia, and continuing the same until the said goods shall be safely landed at the ports aforesaid."

The insurance was in the amount of five thousand dollars, with this clause : "this insurance is declared to be on profits, warranted to be American property, to be proved at Philadelphia only, valued at twenty thousand dollars."

The vessel, with a cargo of flour, proceeded from Philadelphia to Gibraltar, at which place the cargo was destined to be sold, and the proceeds to be invested at Marseilles in the purchase of various specified dry goods. These dry goods were to be sent by the vessel from Marseilles to Sonsonate or Guayaquil. While the vessel lay at Gibraltar, before the discharge of her cargo, she and her cargo were totally lost by fire. Evidence was taken at Philadelphia, as to the circumstances of the destruction of the property, and one witness (Mr Fulford) was examined in addition as to those circumstances at the trial. The testimony of this witness went to show that with proper diligence on the part of the captain and crew, the fire might have been extinguished and the vessel and cargo saved ; and the evidence obtained at Philadelphia was not inconsistent with that conclusion. It appeared from Mr Fulford's testimony, that, soon after the fire commenced, the captain called upon the crew to leave the ship, exclaiming that there was gunpowder aboard, and that the vessel would be blown up ; and the captain and crew did then leave the vessel. It was in evidence that there was a small quantity of gunpowder on board, but that that ought not to have deterred exertions to save the property ; an officer and a number of men from two British frigates hay-

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ing in fact, a considerable time after the vessel was deserted by her captain and crew, boarded her and used all efforts to put out the flames, but unsuccessfully, in consequence of their reaching the scene so late. There was evidence to infer that the fire originated from the carelessness of the captain with a candle used by him for sealing letters, or from negligence of the crew.

Evidence was had at Philadelphia, of Mr Clark, concerning the markets at Sonsorale and Guayaquil, for the specified articles at Marseilles. His testimony tended to show that these articles would have been sold with profit at Guayaquil, at the time the vessel might have reached there. It was proved, that at Gibraltar the flour would have sold without loss, but *without profit*.

The defendants prayed the court to direct the jury,

1. That if they should believe from the evidence, that the fire, which occasioned the destruction of the ship and her cargo, proceeded from the carelessness or negligence of the captain of the ship, or any of her crew, the plaintiff was not entitled to recover.

2. That if they should believe that the fire which occasioned the ship's destruction originated from accident, and without any want of due care and attention on the part of the captain or crew, and if they should further find that the captain and crew, after the discovery of the fire, might, by reasonable and proper exertions, have prevented the spreading of the same, and have preserved the said vessel and cargo from destruction, and that they omitted to use said exertions, then the plaintiff was not entitled to recover.

3. That the plaintiffs had offered no evidence that the sales of the flour at Gibraltar would have yielded the plaintiff a profit, and that therefore they were not entitled to recover.

These prayers the court refused; but as to the second of them directed the jury as follows: "that the plaintiff is entitled to recover, unless they should be of opinion, from the evidence in the cause, that after the vessel was discovered to be on fire, the master and crew might have extinguished

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the same, and preserved the vessel and cargo. The master was bound to extinguish the fire, if practicable. If he stood aloof, without making any exertion to extinguish the fire, and suffered the vessel to be destroyed, it would have afforded evidence of such gross negligence as to amount to *barratry*."

To the refusal of the prayers, and opinion and direction of the court, the defendants, now plaintiffs in error, excepted.

Mr Mayer, for the plaintiffs in error, contended.

1. That they are not answerable, under the policy, for any loss by fire, if occasioned by the negligence of the captain and crew of the Nancy; that the risk of fire bears on the insurers as other risks in the policy; that the assured being bound to the exercise of reasonable skill and care in his agents to guard the property insured against the perils stated in the policy, under the implied warranty of seaworthiness, the underwriters ought not to suffer loss from a fire which the captain or crew might with ordinary care have prevented taking place.

2. That if it was the duty of the captain and crew to prevent the fire, it was equally their duty to extinguish it; and the consequences of their negligence in this particular ought not to fall upon the insurers; and that even the *gross* negligence of the captain and crew, in regard to a duty of this kind, is a mere *nonfeasance*, and is not to be considered *barratry*; that the remissness of the captain, in this case particularly, is not so to be considered, because, however weak his conduct may have been, he was acted upon by inordinate fears only, and by no motives of interest or any views of unauthorised discretion or wilful delinquency.

3. That the profits here insured were incident to the cargo shipped at Philadelphia, and not to any property that might be substituted for it, though acquired with the proceeds of the original cargo; that the contemplated adventure from Marseilles to Guatimala was therefore foreign to the insurance. That even in a valued policy on profits, evidence must be given of some profit likely to result, and that

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without such evidence the insurance has no subject to operate upon ; that the flour being destined to be sold at Gibraltar, and not affording there a profit, as was proved, there is in effect no insurable interest whatsoever shown in the defendant Coulter ; and that he cannot, therefore, recover under a valued policy on profits.

Underwriters are not liable for any loss arising from gross negligence or want of skill of the captain and crew. The object of insurance is to guard against extraordinary perils. They necessarily beset every mercantile adventurer, and there must be skill and diligence to meet them. It is a part of the business of the voyage that those who are on board of the vessel shall be on the alert, and if they are not, the underwriters are exonerated. Marsh. on Ins. 156, 487, 690. 5 Mass. 1. 8 Mass. 321, 436. 13 Johns. 180, 187. Phillips on Ins. 225. If the first cause of the accident which produces the destruction of the vessel was not within the policy, its consequences do not attach to the policy. There is nothing in the terms of the policy against fire which exempts them from the operation of these principles.

If the captain and crew omitted reasonable exertions to extinguish a fire which had occurred from accident, the insurers are not liable ; gross negligence in both is not barratry ; and if they stood aloof without making proper and sufficient efforts to prevent the ravages of the fire, the court should have left these facts to the jury, from which they could have inferred for the assurers. Abbot on Ship. 128, note. 8 Cranch, 49. 5 Mass. 1. 8 Mass. 531. Marsh. on Ins. 515. Phill. on Ins. 230. 8 East, 133.

The cargo would have produced no profit, and the plaintiff offered no proof that profits would have been obtained on the cargo sent from Philadelphia ; and the insurance attached only to the cargo shipped there. Some profits must be proved before the underwriters are answerable, as this cannot be left to inference. 6 East, 315. 12 East, 124. 16 East, 218. The policy is a contract of indemnity for actual injury or loss ; and the principles of the law of insurance are against wagering policies. 2 Mass. 1. 12 Wheat. 288. Phill. 69. It is admitted that a party may cover a

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series of adventures, and expected profits on them; but if he has omitted to do this in explicit terms, he must sustain the loss himself. The terms of this policy are not broad enough to cover all the profits anticipated, and which are claimed from the underwriters, the plaintiffs in error. Marsh. on Ins. 323. Phill. 166. 2 Mass. 409. 4 Camp. 294. 12 East, 283. 1 Taunt. 463. 12 Wheat. 283. 6 Mass. 197. 2 Mass. 420.

Mr Wirt, for the defendant in error, argued, that the facts of the case made out a loss by accident or misfortune, and of innocence on the part of the master; and that from the situation of the vessel, part of the crew being absent, and the fact of there being powder under the cabin floor when the fire broke out, no other efforts than those which were made to save her would have been prudent or proper; all the skill that could be expected was employed. According to the established principles of the law of insurance, there must be ignorance so gross as to amount to unseaworthiness to excuse the insurer, but not otherwise.

It would be the introduction of a new principle in the law of insurance, if the want of more than common care and usual skill would discharge the underwriters. Every loss would be traced to such a proximate cause. A ship is left in a storm; would proof that setting another sail would have placed her beyond the peril excuse the underwriters? The seaman at the mast head, whose duty it is to look out for land, as a coast is approached falls asleep, and the vessel is lost; this, under the principle claimed, would release the assurers. The underwriters will undertake to inquire whether the captain and crew should have resisted longer, before they submitted in battle. Human infirmities are at the risk of the insurers, as well as the perils of navigation.

The cases decided in England repudiate the doctrine asserted by the plaintiff in error, and for the reasons and on the principles now submitted to the court. 2 Barn. & Ald. 72. 5 Barn. & Ald. 171. 7 Barn. & Cress. 217. 14 Com. Law Rep. 33. 7 Barn. & Cress. 794. 14 Com. Law Rep. 129.

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Gross negligence is, upon adjudged cases, barratry; and thus, if such should have occurred in this case, the underwriters would be liable. 2 Camp. 149. 8 East, 126. 11 Petersdorf, 268. 2 Phill. on Ins. 237. 2 Camp. 620. 1 Taunt. 227. 2 New Rep. 336. 4 Taunt. 226. Peake, 212. 1 Camp. 123.

The policy attached to the whole voyage, and was intended to cover the profits upon it. The interruption or breaking up of the voyage, preventing the earning of those profits; and in whatever part of it the occurrence took place, entitled the assured to recover the amount of the policy. An insurance on profits has been settled to be legal and proper. In the American courts it is not necessary to prove what the profits would have been, but in England the rule is otherwise.

Courts construe the policy liberally, to include all the objects and intentions of the parties, according to the nature of the voyage. In this case, the subject of insurance was the profits on the whole voyage, and the cargo which was taken on board at Philadelphia was to furnish the means of proceeding with the adventure. By its loss, the whole of the profits were lost. *Catlett vs. The Columbian Insurance Company*, 12 Wheat. 383. Phill. on Ins. 319, 29, 70, 46. 47.

Mr Justice Johnson delivered the opinion of the Court:

This was a case of insurance on profits on a voyage from Philadelphia to Gibraltar, and a port in the Mediterranean not higher up than Marseilles, and at and from thence to Sonsonate, in the province of Guatemala, Pacific Ocean, with the liberty of Guayaquil. The risks are those usually inserted in policies, including fire, and barratry. The loss alleged is from fire alone.

The vessel reached Gibraltar in safety, and while lying there, took fire and was entirely consumed; together with her cargo.

The evidence on the part of defendants below went, first, to charge the master with having caused the fire by his own carelessness; secondly, with having desisted, and restrained the crew and others, from efforts which might have extinguished the fire, under apprehensions not very well founded,

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that it would communicate with powder, laden near to where the fire originated. It was also objected to the plaintiff's right of recovery, that he had given no kind of evidence of profits, or probable profits, from a sale at Gibraltar,

This difference furnishes the subject of three bills of exception. The first of which went to the refusal of the court to instruct the jury, that if they believed the fire proceeded from the negligence or carelessness of the captain, the plaintiff below was not entitled to recover.

The second, that if they believed the fire originated in accident, without any want of due care and attention in the captain and crew, yet, if after it had commenced, the captain and crew might with ordinary care and exertion have extinguished it, the plaintiff below was not entitled to recover.

The first of these instructions was refused expressly. The second was refused as prayed; and in its stead the court instructed the jury, that the plaintiff was entitled to recover, unless they should be of opinion from the evidence, that after the vessel was discovered to be on fire, the master and crew might have extinguished it, and preserved the vessel and cargo. That the master was bound to extinguish the fire, if practicable; and if he stood aloof without making any exertion to extinguish it, and suffered the vessel to be destroyed, it would have afforded evidence of such gross negligence as would amount to barratry.

As the plaintiff below is in possession of the verdict, it is immaterial to him if this charge was more favourable to his adversary than the law admits. We have only to do with so much of the case presented by these bills of exception, as makes against the interest of the insurers.

And as to the refusal to instruct the jury that "their verdict must be for the insurers, if they believe the loss to have proceeded from the carelessness or negligence of the captain," it is obvious, since barratry is insured against, that the court must not be held to have affirmed that fire proceeding from negligence was a loss within the policy, independently of the risk of barratry, but that negligence was no defence where barratry was insured against.

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It cannot be denied, that what with adjudged cases and elementary opinions, this doctrine has got into a great deal of confusion. Many attempts have been made to define the term barratry, in its marine sense; but when compared with the ideas attached to the word, as derived from the most respectable sources, such definitions will too generally be found deficient in precision or comprehensiveness; they need commentaries to apply or explain them. And it is remarkable, that the point in which all the definitions in the English or American authorities agree; to wit, that fraud must be a constituent of the act of barratry; is that in which practically all the difficulties arise. The question seems to be between "dolus" and "culpa," which of those two words best conveys the sense of the law.

It cannot be denied that the etymology of the word favours the adoption of the former. The term barratry is known to the common law; and Cowel's Interpreter refers its origin to a Latin word, which would attach to it the idea of meanness, selfishness, and knavery. Some of our English books, following a French writer, (*Pasquier sur Emerigon,*) derive it from "barat," an old French or Italian word, which they explain by "tromperie, fourbe, mensonge."

I should myself derive the word from the Spanish *barateria*, *baratero*, which are rendered *fraus*, and *fraudulentus*. But it is worthy of particular notice, that writers on maritime law of the first respectability (I think Emerigon, gives six in number) in explaining the marine sense of the word barratry, use the French word "prevariquez," which can only be translated into "acting without due fidelity to their owners." The best French dictionary we have renders it by "agir contre les devoirs de son charge," acting contrary to the duties of his undertaking, and "trahir la cause ou l'interet des personnes qu'on est obligé de défendre," to betray the cause or interest of those whom we are bound to protect.

Nor will it be found that the idea of the British courts of the meaning of fraud as applied to barratry varies perceptibly from this exposition. In the case of *Moss vs. Byron*, 6 T. R. 379, we find the very words adopted by one of the judges;

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"if the captain acted contrary to his duty to his owners," it was barratry; and "if he did any act to increase the risk," it was barratry. And in the case of *Burk vs. The Royal Exchange Insurance Company*, the court lay it down as the law, that the term barratry is used in the policies as applicable to the "wilful misconduct" of the master and mariners. And even in the case of *Phyn vs. The Royal Insurance Company*, in which Laurence, Justice, wishes to resume or explain his definition, in *Moss vs. Byron*, he concludes with adopting the definition of Lee, C. J. in *Stemmer vs. Brown*, in which he says, "barratry must be some breach of trust in the master *ex maleficio*," in which, I presume, maleficium must mean some wilful and injurious act. And as this case is given by the latest English compiler (11 Petersdorf, 269, Case 6) as the authority for the unqualified doctrine "that there must be fraud to constitute barratry, and the definition of C. J. Lee, just quoted, is given in his margin, as comprising the substance of this case, we are furnished with an apt opportunity of ascertaining the idea attached in Great Britain to both the terms "fraud" and maleficium, by referring to the case itself.

The defence of the underwriters there turned upon a deviation, and the question was whether it was a fraudulent deviation. If a general deviation, the underwriters were discharged; but if a fraudulent deviation, then it was barratry and a risk in the policy. The whole evidence in the cause in which the question of fraud was raised, was this: the vessel was bound from London to Jamaica, but was driven by currents out of her course. Upon recovering her reckoning, she was found to be between the Grand Canaries and the Island of Teneriffe. In this situation it was admitted that her course was south west, instead of which the captain bore up for the island of Santa Cruz, which lay north west, and in sight about thirty miles off, and came to anchor; for the purpose, as is supposed in the argument, to get refreshments, or in some way for his own accommodation. The jury found it to be a simple deviation without fraud, and the court only decide that they cannot adjudge it a fraudulent deviation in opposition to the finding of the jury. But it is

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no where hinted that the jury might not have found it otherwise, and their verdict have been sustained upon the evidence in that cause.

On the contrary, so far as fraud or maleficium may be supposed to imply a dishonest or injurious intention towards the owner, the idea is negatived by a variety of cases. In that of Earle vs. Rowcroft, 8 East, 126, it was admitted that the captain unaffectedly acted with a view to promote the owners' interest, and would materially have promoted their interest had he escaped detection. But he had deviated from his instructions, and increased the risk by trading with an enemy; and it was held to be barratry. The court there say, it has been asked how is this act of the captain in going into d'Elmina, in order to purchase the cargo for his owners more cheaply and expeditiously, a *breach of trust* as between him and them? Now I conceive that the trust reposed in a captain of a vessel obliges him to obey the written instructions of his owners, where they give any; and where the instructions are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage.

Here we see that an act "inconsistent with written instructions," and an act "not consonant to the laws of the land," are brought within the description of fraud upon the owners, as applied to the definition of barratry. From which it would seem to result, that it is not confined to moral fraud; or that the term is not well chosen; or that practically, in its application to this subject, *culpa* would better express the idea than *dolus*.

The commercial regulations of maritime nations, both of ancient and modern times, are very various on the subject of the liability of assurers for the acts of the master; and it is not without much appearance of reason that Emerigon observes, that the French ordinance has put it upon the just medium.

The regulations on this subject are contained in the twenty-sixth, twenty-seventh and twenty-eighth articles of the fifth title.

By the twenty-sixth article, "all losses and damages hap-

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pening at sea, by tempest, shipwreck, running aground or aboard of other ships, changing the course of the voyage or of the ship, ejection, fire, taking, rifling, detention by princes, declaration of war, reprisals, and generally by all maritime accidents, shall be at the risk of the insurers. By the twenty-seventh, however, if the changing of the course, voyage, or ship happens by the order of the insured, without the consent of the insurers, they shall be discharged from the risk ; which shall likewise take place in all other losses and damages happening by the fault of the insured ; nor shall the insurers be obliged to restore the premium, if the time of their bearing the risk be begun. Nor shall the insurers be obliged to bear the losses and damages happening to ships and goods by the *fault* of the master and mariners, except that by the policy they be engaged for the barratry of the master.

It is this last rule to which the observation of Emerigon is particularly directed ; and although the British decisions do not adopt the negative language of the regulation without limitation, they certainly come up to the positive rule which it implies, whenever the case of the master is considered *a fault with reference to his duty to his owner*.

It has been remarked by a British court, (*Busk vs. The Royal Ex. Ass. Company*, 2 Barn. & Ald. 82,) that in France, negligence, as well as wilful misconduct, is considered barratry ; and they give the authority of the commentator on the ordinance of Louis the Fourteenth, Valin, for the assertion. But as the author is commenting upon the twenty-eighth article, I am inclined to consider the passage as only intimating that negligence is a fault within the words of the ordinance.

And the same court, in the same cause, have certainly affirmed the same principle, in its positive sense ; that is, that where an insurance is against barratry, a loss arising from fire originating in negligence shall be borne by the underwriters.

It would be a great relief to this court, if there existed such an uniformity in the decisions upon this subject, as to place our decision upon adjudged cases. But it is not to be questioned, that the English and American decisions are in

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direct hostility with each other, as to a loss by fire arising from negligence, where there is an insurance against barratry.

It must be repeated, that the general question where there is no insurance against barratry need not here be considered. The judge was not bound to give an instruction abstracted from the case. And the question, whether, where the breach laid was loss by fire only, the plaintiff could maintain his action by giving in evidence a barratrous burning, did not properly occur. The point when properly stated stands thus: the plaintiff lays the breach by fire, and the defendant, to repel his liability, insists that the fire was produced by negligence of the master; the plaintiff replies that negligence is no defence where the barratry is insured against; the court maintains the doctrine of the plaintiff, and adds, that negligence itself, when gross, is evidence of barratry. And certainly a master of a vessel who sees another engaged in the act of scuttling or firing his ship, and will not rise from his birth to prevent it, is *prima facie* chargeable with barratry. Although a mere misfeasance, it is a breach of trust, a fault, an act of infidelity to his owners. So if, in the height of a storm, the captain and crew turn in without resorting to the nautical precautions of laying the vessel to and otherwise preparing her to overcome the peril, it may well be left to a jury to determine if such conduct be not barratrous.

The truth is, that in the incidents to this kind of contract, misfeasance and nonfeasance often approach so near to each other in character and consequences, that it is not surprising if courts of justice should incline to the adoption of rules which would relieve them from the difficulty of discriminating, or the inconsistencies that might result from their efforts to discriminate.

The case of *Green vs. The Phoenix Insurance Company*, decided in New York, was certainly a very strong case to establish the doctrine that a loss by fire, proceeding from negligence of the master and mariners, was not a loss within the policy, although barratry be one of the risks. It will, however, be found, by looking into the reasons which govern-

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ed the court in that case, that its conclusions were drawn partly from the too general expressions of an elementary writer, and partly from analogy with other decisions in which the expressions of the court, unless restricted to the cases before them, were justly deemed authority for the decision there rendered. The question was one of the first impression, and one on which the best constituted minds may well have been led to contrary conclusions. It was however no unreasonable claim upon the profession made by Lawrence, Justice, in the case of *Phyn vs. The Royal Ex. Ass. Company*, with regard to his own doctrines in *Moss vs. Byron*, "that what fell from him there must be taken in reference to the case then in judgment before the court." Thus restricted doctrines will often be found correct, which in a more general sense might well be questioned. And in the case of *Voss and Graves vs. The Un. Ins. Company*, and also in that of *Cleveland vs. The same Company*, relied upon in the New York decision, the act of the master, for which the underwriters were held to be discharged, was in the first instance sailing towards a blockaded port with intent to violate the blockade, and in the second, leaving his register behind him. The first of these cases did not call for the opinion of Kent, Justice, on the subject of negligence; the second is exactly one of those cases in which a nonfeasance becomes a misfeasance, and both relate to the discharge of a duty unquestionably belonging to the insured, and the master as his agent. Attempting a breach of blockade was an unwarrantable increase of risk, which might or might not be barratrous according to circumstances. And for a vessel to leave her register behind in time of war, affected her seaworthiness as much as leaving her compass or quadrant or anchors at home at any time. So neglecting to take a pilot, neglecting to pay port duties, neglecting to obtain a clearance, neglecting to comply with the laws of any port which the vessel has leave to enter; all these, although nonfeasances, involve misfeasances, which discharge the underwriters, because they violate implied duties incident to navigating the vessel, and produce a positive and definite increase of risk. It was not until the year 1818, that the question was set-

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tled in the British courts, on the liability of the underwriters for a loss like the present. In the case of *Busk vs. The Royal Exchange Assurance Company*, the question is finally and fully decided there, in direct hostility with the decision in New York; and this court is now for the first time called upon to establish a rule for its own government in similar cases.

Losses by fire must happen either from the act of God, from design, or from accident. If from design, and by the captain and crew, it is barratry; if by any other person, or by pure accident, it is clearly a risk by fire, but from the peculiar character of this risk, it is no easy matter to point out an accident that may not be resolved into negligence. If by the falling of a candle, it may have been because due care was not bestowed upon securing it; and if from a spark from the cambouse, it may have been from neglect in not closing or constructing it; and if from a flue or a stove, the same reason may be assigned. It has already been shown, that gross negligence may be evidence of barratry, and when it is considered how difficult it is to decide where gross negligence ends, and ordinary negligence begins, and to distinguish between pure accident and accident from negligence, we cannot but think that the British courts have adopted the safe and legal rule, in deciding, that where the policy covers the risk of barratry, and fire be the proximate cause, they will not sustain the defence, that negligence was the remote cause.

We think this rule also the most consistent with analogy and mercantile understanding. It is very justly observed in the case of *Busk vs. The Royal Exchange Assurance Company*, that it is a strong argument against the objection there raised for the first time, that in the great variety of cases that have occurred upon marine policies, no such point had ever been made. And I will add, it is not improbable from comparison of dates, that the defence maintained in the New York decision, suggested that made in the British courts.

The long acquiescence may have had its origin in a general mercantile understanding, or perhaps in the doctrine of Malynes, whose book unites the recommendations of antiquity, good sense, and practical knowledge. The passage

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has been misquoted as to its place: it is found in page 155, in these words: "barratry of the master and mariners can hardly be avoided, but by a provident care to know them, or at least the master of the ship upon which the assurance is made. And if he be a careful man, the danger of fire above mentioned will be the less for the ship; boys must be looked unto every night and day. And in this case let us also consider the assurers; for it has oftentimes happened, that by a candle unadvisedly used by the boys, or otherwise, before the ships were unladen, they have been set on fire and burnt to the very keel, with all the goods in them, and the assurers have paid the sums of money by them assured. Nevertheless, herein the assurers might have been wronged, although they bear the adventure until the goods be landed; for it cometh to pass sometimes, that whole ships' ladings are sold on ship board, and never discharged," &c. In the residue of this passage the author certainly intimates that the wrong done to the assurers is in being made to pay after the transfer of the interest to a third person, and the initiation of a new voyage. And the general doctrines involved in this case are certainly sustained by analogy to other cases. It seems generally conceded, that in the case of insurance against fire on land, negligence of servants or of the tenant is no defence, nor of the proprietor, unless of such a character as to sustain the imputation of fraud or design. And the rule that a loss, the proximate cause of which is a peril insured against, is a loss within the policy, although the remote cause may be negligence of the master or mariners, has been affirmed in several successive cases in the English courts. The case of *Watkins vs. Maitland*, cited in argument, is a very strong case of this description. And both in that and the case of *Bishop vs. Pentland*, decided as late as 1827, the decision in *Busk vs. The Royal Exchange Assurance Company* is expressly quoted by the court, and affirmed as law. So that the doubt expressed by Mr Phillips upon the authority of that case does not seem well founded. *Phillips on Insurance*, 249.

It is true that in the application of the principles to particular cases, courts of justice will sometimes find themselves

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embarrassed in discriminating between that crassa negligentia which will discharge the underwriters by varying or increasing the risk, and that upon which they may be made liable on the ground of barratry ; but the difficulty is only one which those engaged in the administration of justice have often to feel and lament—to wit, the difficulty of fathoming men's motives ; and in this the court can only rely on the judgment and experience of juries. While the captain is not regardless of his duty to his owner, his actions cannot be barratrous ; but if no act of infidelity to the owner be imputable to him from the evidence, then it is affirmed in various cases that a material increase of the risk from gross negligence may discharge the underwriters. Such was admitted to be the law in *Toulmin vs. Anderson*, 1 Taunt. 227, and *Toulmin vs. Inglis*, 1 Camp. The case of *Pipon vs. Cope*, 1 Camp. 434, was decided on this distinction, and the defence set up in *Heyman vs. Parish*, 2 Camp. 149, went upon the same ground. It is true these are *nisi prius* cases, but they serve to illustrate the doctrine and course of decision.

In the case of *Arcangelo vs. Thompson*, 2 Camp. 620, it was ruled, that where the loss was laid by capture, it was no defence for the underwriters, to prove that the capture was barratrous ; and it would indeed be singular, if where one breach is laid and proved, the party defendant could avail himself of another breach for which he was equally liable on the same contract.

The third prayer for instruction is in these words : “that the plaintiffs had offered no evidence that the sales of the flour at Gibraltar would have yielded the plaintiffs a profit, and that therefore they were not entitled to recover.” This was refused, and the question is, whether the defendants were entitled to it, as prayed.

This instruction presents two propositions : 1. That it was necessary to prove loss of profits, otherwise than by the loss of the cargo. 2. That the plaintiff was limited to proof of profits on a sale at Gibraltar. With regard to the second it is clear that the instruction was properly refused, for there was nothing in the policy to prevent the assured from proceeding with the original cargo to the Pacific, although the

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course of trade would have sanctioned him in selling and replacing it. But the first proposition is one of more difficulty.

Courts of justice have got over their difficulties on the question whether profits are an insurable interest, but how and where that interest must be established by proof, in case of loss, is not well settled. Here again there appears to be a conflict between the British and American decisions.

The earliest of the British decisions, that of *Barclay vs. Cousins*, 2 East, 544, certainly supports the doctrine that the profits sink with the cargo, or at least that the loss of one is *prima facie* evidence of the loss of the other, and throws the *onus probandi* upon the defendant. Such is the intimation of the court, p. 551, and the recovery was had in that case without proof that profit would have been made had the cargo arrived at the destined port. In the case of *Henrickson vs. Margetson*, 2 East, 549, of which a note is given in that case, the recovery was also had without proof that the profits would have been made, or any other proof than an interest in and loss of the cargo; and lord Mansfield seems to have suggested the true ground for dispensing with such proof: to wit, the utter impracticability of making it, without the spirit of prophecy to determine the precise time when the vessel would arrive at her destined port.

The two subsequent cases which are cited in the elementary books to sustain the contrary doctrine, are not full to the point. In that of *Hodgson vs. Glover*, 6 East, 316, there was another question of as great difficulty: to wit, whether in a clear case of average loss, the plaintiff could recover as for a total loss, or recover any thing without evidence to determine the average. Of the four judges who sat, two decided against the plaintiff, upon the one ground, and two upon the other.

In the second case, that of *Eyre vs. Glover*, 16 East, 218, although the point was touched upon in argument, yet the court neither expressly affirm nor deny it; it was not the leading question in the cause; and at last, judgment is rendered for plaintiff without requiring such proof. But the case of *Mumford vs. Hallet*, 1 Johns. 439, goes further. It

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as a case of insurance on profits, in which there was no evidence given that profits would have been made upon a arrival, nor was any other loss proved than an incident to the loss of the goods. On that state of facts, Livingston, justice, who delivers the opinion of the court, remarks, "it does not follow that a profit will be made if the cargo arrived, yet its loss would give a right to recover on such a policy." There are other questions in the case; but, after all were settled; this principle was essential to the plaintiff's right to recover.

In the case of Fosdick *vs.* The Norwich Insurance Company, decided in the supreme court of errors of Connecticut, the question was moved in argument, that to justify a recovery the plaintiff must show that profits would have accrued upon safe arrival of the goods; but the language of the court, in expressing their decision, is not so explicit as to enable us to determine whether it was intended to apply as well to the proof of loss as to the insurable interest. Yet the right of the plaintiff to recover being affirmed in that case without other proof than the loss of the goods, it would seem to be an authority for the doctrine that no other was necessary.

The report furnishes no other proof of loss of profits than what was implied in the loss of the cargo in which the insured had an interest. And on the question of insurable interest, which was the main question in the cause; the chief justice asks, "if profits are any thing more than an excrescence upon the value of goods beyond the prime cost."

As to the American cases, Mr Phillips quotes that of Loomis *vs.* Shaw, (if I understand his language as he meant to use it,) as going farther than the case warrants; 2 Johns. Ca. 36. The court waives the question now under consideration, by suggesting that the defendant had waived it by an act of his own.

In the case of Abbot *vs.* Sebor, 3 Johns. Ca. 39, which was a motion for a new trial, the decision turned chiefly on the question, whether the court had misdirected the jury in instructing them, that the plaintiff must recover the whole sum insured on profits, or nothing. That is, that he could

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not recover for an average loss. The question, if proof that profits would have been made had the vessel arrived in safety was necessary to his recovering, was not touched. Yet the right to recover is affirmed in that case, and it does not appear that any proof to that effect had been offered or required, beyond the loss of the goods on which the profit was expected. But the authority amounts to no more than an implication.

We must now dispose of the question upon reason and principle; and here it seems difficult to perceive why, if profit be a mere excrescence of the principal, as some judges have said; or an incident to or identified with it, as others have said; why the loss of the cargo should not carry with it the loss of the profits. This rule has convenience and certainty to recommend it; of which this case presents a striking illustration. Here was a voyage of many thousand miles to be performed, the final profits of which must have been determined by a statement of accounts passing through several changes, some of which might have resulted in loss, some in gain; and in each case the good or ill fortune of the adventure turning on the gain or loss of a day in the voyage. What human calculation or human imagination could have furnished testimony on a fact so speculative and fortuitous? To have required testimony to it, would have been subjecting the rights of the plaintiff to mere mockery.

On this point we must support the American decisions.

Justices THOMPSON and BALDWIN, dissenting.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed with costs and damages, at the rate of six per centum per annum.

ANN SHANKS, MARGARETTA SHANKS, SARAH P. SHANKS, GRACE F. SHANKS, AND ELIZA SHANKS, (APPELLANTS BELOW) PLAINTIFFS IN ERROR vs. ABRAHAM DUPONT AND JANE HIS WIFE, DANIEL PEPPER AND ANN PEPPER, DEFENDANTS IN ERROR.

Thomas Scott, a native of South Carolina, died in 1792, intestate, seized of land on James Island, having two daughters, Ann and Mary, both born in South Carolina before the declaration of independence. Sarah married D. P. a citizen of South Carolina, and died in 1802, entitled to one half of the estate. The British took possession of James Island and Charleston in February and May 1780; and in 1781 Ann Scott married Joseph Shanks, a British officer, and at the evacuation of Charleston in 1782, she went to England with her husband, where she remained until her death in 1801. She left five children born in England. They claimed the other moiety of the real estate of Thomas Scott, in right of their mother, under the ninth article of the treaty of peace between this country and Great Britain of the 19th of November 1794. Held that they were entitled to recover and hold the same.

If Ann Scott was of age before December 1782, as she remained in South Carolina until that time, her birth and residence must be deemed to constitute her by election a citizen of South Carolina, while she remained in that state. If she was not of age then, under the circumstances of this case, she might well be deemed to hold the citizenship of her father; for children born in a country, continuing while under age in the family of the father, partake of his natural character as a citizen of that country. [245]

All British born subjects whose allegiance Great Britain has never renounced, ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words of the treaty of 1794. [250]

The capture and possession of James Island in February 1780, and of Charleston, on the 11th of May in the same year, by the British troops, was not an absolute change of the allegiance of the captured inhabitants. They owed allegiance to the conquerors during their occupation; but it was a temporary allegiance, which did not destroy, but only suspended their former allegiance. [246]

The marriage of Ann Scott with Shanks, a British officer, did not change or destroy her allegiance to the state of South Carolina, because marriage with an alien, whether friend or enemy, produces no dissolution of the native allegiance of the wife. [246]

The general doctrine is, that no person can, by any act of their own, without the consent of the government, put off their allegiance and become aliens. [246] The subsequent removal of Ann Shanks to England with her husband, operates as a virtual dissolution of her allegiance, and fixed her future allegiance to the British crown by the treaty of peace in 1783. [246]

The treaty of 1783 acted upon the state of things as it existed at that period: It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American states, were virtually absolved from all allegiance to the British crown; all those who then adhered to the British crown were deemed and held subjects of that crown. The treaty of

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peace was a treaty operating between states and the inhabitants thereof.
[247]

The incapacities of females covert provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. These political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations. [248]

THIS was a writ of error from the supreme court of appeals in law and equity, in and for the state of South Carolina.

The suit arose out of a partition of a tract of land in the state of South Carolina; the right of the plaintiffs in error to a moiety having been denied on the ground of their alienage, and their consequent incapacity to inherit the same.

The case was argued at January term 1829, by Mr Cruger and Mr Wirt for the plaintiffs in error; and by Mr Legaré for the defendants; and was held under advisement to this term.

The facts of the case are fully stated in the opinion of the court.

The counsel for the plaintiffs in error contended, that Ann Shanks, the mother of the plaintiffs in error, was a British subject, and that her title was protected by the treaty of 1794. The decree of the court of the state of South Carolina was therefore erroneous, and should have been in favour of the plaintiffs, for a moiety of the land of which Thomas Scott died seised.

The defendants in error insisted, that the decree of the state court ought to be affirmed, because Mrs Shanks was an American citizen, capable of holding by the laws of South Carolina; so that there was no interest or title in her, to which the ninth article of the treaty of 1794, by which the titles of British subjects, holding lands in this country, were saved from the disabilities of alienage, could in any wise attach.

Mr Justice STORY delivered the opinion of the Court.

This was a writ of error to the highest court of appeals in

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law and equity of the state of South Carolina ; brought to revise the decision of that court, in a bill or petition in equity, in which the present defendants were original plaintiffs, and the present plaintiffs were original defendants. From the record of the case it appeared that the controversy before the court respected the right to the moiety of the proceeds of a certain tract of land, which had been sold under a former decree in equity, and the proceeds of which had been brought into the registry of the court. One moiety of the proceeds had been paid over to the original plaintiffs, and the other moiety was now in controversy. The original plaintiffs claimed this moiety also upon the ground that the original defendants were aliens and incapable of taking the lands by descent from their mother, Ann Shanks, (who was admitted to have taken the moiety of the land by descent from her father Thomas Scott,) they being British born subjects.

The facts, as they were agreed by the parties, and as they appeared on the record, were as follows :

Thomas Scott the ancestor, and first purchaser, was a native of the colony of South Carolina, and died intestate, seised of the lands in dispute, in 1782. He left surviving him two daughters, Sarah and Ann, who were also born in South Carolina, before the declaration of independence.

Sarah Scott intermarried with Daniel Pepper, a citizen of South Carolina, and resided with him in that state until 1802, when she died leaving children, the present defendants in error, whose right to her share of the property is conceded.

The British took possession of James Island, on the 11th of February 1780, and Charleston surrendered to them on the 11th of May in the same year.

In 1781, Ann Scott was married to Joseph Shanks, a British officer, and at the evacuation of Charleston, in December 1782, went with him to England, where she remained until her death, in 1801. She left five children, the present plaintiffs in error, British subjects, who claimed in right of their mother, and under the ninth article of the treaty of peace between this country and Great Britain of the 19th of November 1794, a moiety of their grandfather's estate in South Carolina.

The decision of the state court was against this claim, as

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not within the protection of the treaty, because Mrs Shanks was an American citizen.

The cause was argued by Cruger and Wirt, for the plaintiffs in error; and by Mr Legaré, for the defendants in error.

After the elaborate opinions expressed in the case of *Inglis vs. The Trustees of the Sailor's Snug Harbour*, ante p. 99, upon the question of alienage, growing out of the American Revolution; it is unnecessary to do more in delivering the opinion of the court in the present case, than to state, in a brief manner, the grounds on which our decision is founded.

Thomas Scott, a native of South Carolina, died in 1782, seized of the land in dispute, leaving two daughters surviving him, Sarah, the mother of the defendants in error, and Ann, the mother of the plaintiffs in error. Without question Sarah took one moiety of the land by descent; and the defendants in error, as her heirs, are entitled to it. The only question is whether Ann took the other moiety by descent; and if so, whether the plaintiffs in error are capable of taking the same by descent from her.

Ann Scott was born in South Carolina, before the American revolution; and her father adhered to the American cause, and remained and was at his death a citizen of South Carolina. There is no dispute that his daughter Ann, at the time of the revolution, and afterwards, remained in South Carolina until December 1782. Whether she was of age during this time does not appear. If she was, then her birth and residence might be deemed to constitute her by election a citizen of South Carolina. If she was not of age, then she might well be deemed under the circumstances of this case to hold the citizenship of her father; for children born in a country, continuing while under age in the family of the father, partake of his national character, as a citizen of that country. Her citizenship, then, being *prima facie* established, and indeed this is admitted in the pleadings, has it ever been lost; or was it lost before the death of her father, so that the estate in question was, upon the descent cast, incapable of vesting in her? Upon the facts stated, it appears to us that it was not lost; and that she was capable of taking it at the time of the descent cast.

The only facts which are brought to support the suppo-

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sition, that she became an alien, before the death of her father, are, that the British captured James Island in February 1780, and Charleston in May 1780; that she was then and afterwards remained under the British dominion in virtue of the capture; that in 1781, she married Joseph Shanks, a British officer, and upon the evacuation of Charleston in December 1782, she went with her husband, a British subject, to England, and there remained until her death in 1801. Now, in the first place, the capture and possession by the British was not an absolute change of the allegiance of the captured inhabitants. They owed allegiance indeed to the conquerors during their occupation; but it was a temporary allegiance, which did not destroy, but only suspend their former allegiance. It did not annihilate their allegiance to the state of South Carolina, and make them *de facto* aliens. That could only be by a treaty of peace, which should cede the territory, and them with it; or by a permanent conquest, not disturbed or controverted by arms, which would lead to a like result. Neither did the marriage with Shanks produce that effect; because marriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife. It may change her civil rights, but it does not effect her political rights or privileges. The general doctrine is, that no persons can by any act of their own, without the consent of the government, put off their allegiance, and become aliens. If it were otherwise, then a *femme alien* would by her marriage become, *ipso facto*, a citizen, and would be dowable of the estate of her husband; which are clearly contrary to law (a).

Our conclusion therefore is, that neither of these acts warrant the court in saying that Ann Shanks had ceased to be a citizen of South Carolina, at the death of her father. This is not, indeed, controverted in the allegations of the parties.

The question then is, whether her subsequent removal with her husband operated as a virtual dissolution of her allegiance, and fixed her future allegiance to the British crown

(a) See *Kelly vs. Harrington*, 2 Johns. Cas. 29. Co. Litt. 31, b. Com. Dig. Alien. C. 1. Dower, A. 2. Bacon's Abridg. Alien. Dower, A.

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by the treaty of peace of 1783. Our opinion is that it did. In the first place, she was born under the allegiance of the British crown, and no act of the government of Great Britain ever absolved her from that allegiance. Her becoming a citizen of South Carolina did not, *ipso facto*, work any dissolution of her original allegiance, at least so far as the rights and claims of the British crown were concerned. During the war, each party claimed the allegiance of the natives of the colonies as due exclusively to itself. The American states insisted upon the allegiance of all born within the states respectively; and Great Britain asserted an equally exclusive claim. The treaty of peace of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American states, were virtually absolved from all allegiance to the British crown. All those who then adhered to the British crown, were deemed and held subjects of that crown. The treaty of peace was a treaty operating between the states on each side, and the inhabitants thereof; in the language of the seventh article, it was a firm and perpetual peace between his Britannic majesty and the said states, "*and between the subjects of the one and the citizens of the other.*" Who were then subjects or citizens, was to be decided by the state of facts. If they were originally subjects of Great Britain and then adhered to her, and were claimed by her as subjects, the treaty deemed them such. If they were originally British subjects, but then adhering to the states, the treaty deemed them citizens. Such, I think, is the natural, and indeed almost necessary meaning of the treaty; it would otherwise follow, that there would continue a double allegiance of many persons; an inconvenience which must have been foreseen, and would cause the most injurious effects to both nations.

It cannot, we think, be doubted that Mrs Shanks, being then voluntarily under British protection, and adhering to the British side, by her removal with her husband was deemed by the British government to retain her allegiance, and to be, to all intents and purposes, a British subject. It may

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be said that, being sub potestate viri, she had no right to make an election; nor ought she to be bound by an act of removal under his authority or persuasion. If this were a case of a crime alleged against Mrs Shanks, in connexion with her husband, there might be force in the argument. But it must be considered, that it was at most a mere election of allegiance between two nations, each of which claimed her allegiance. The governments, and not herself, finally settled her national character. They did not treat her as capable by herself of changing or absolving her allegiance; but they virtually allowed her the benefit of her choice, by fixing her allegiance finally on the side of that party to whom she then adhered.

It does not appear to us that her situation as a feme covert disabled her from a change of allegiance. British femes covert residing here with their husbands at the time of our independence, and adhering to our side until the close of the war, have been always supposed to have become thereby American citizens, and to have been absolved from their antecedent British allegiance. The incapacities of femes covert, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations. The case of *Martin vs. The Commonwealth*, 1 Mass. Rep. 347, turned upon very different considerations. There the question was, whether a feme covert should be deemed to have forfeited her estate for an offence committed with her husband, by withdrawing from the state, &c. under the confiscation act of 1779; and it was held that she was not within the purview of the act. The same remark disposes of the case of *Sewall vs. Lee*, 9 Mass. Rep. 363, where the court expressly refused to decide whether the wife by her withdrawal with her husband became an alien. But in *Kelly vs. Harrison*, 2 Johns. Cas. 29, the reasoning of the court proceeds upon the supposition, that the wife might have acquired the same

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citizenship with her husband, by withdrawing with him from the British dominions(a).

But if Mrs Shanks's citizenship was not virtually taken away by her adherence to the British at the peace of 1783, still it must be admitted that, in the view of the British government, she was, at that time, and ever afterwards to the time of her death, and indeed at all antecedent periods, a British subject. At most, then, she was liable to be considered as in that peculiar situation, in which she owed allegiance to both governments, *ad utriusque fidem regis*. Under such circumstances, the question arises whether she and her heirs are not within the purview of the ninth article of the treaty with Great Britain of 1794. It appears to us that they plainly are. The language of that article is, "that *British subjects* who now hold lands in the territories of the United States, and *American citizens* who now hold lands in the dominions of his majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein, &c. &c.; and that neither they, nor their heirs or assigns shall, so far as respects the said lands, and the legal remedies incident thereto, be regarded as aliens.

Now, Mrs Shanks was at the time a *British subject*, and she then held the lands in controversy; she is therefore within the words of the treaty. Why ought she not also to be held within the spirit and intent? It is said that the treaty meant to protect the rights of British subjects, who were not also American citizens; but that is assuming the very point in controversy. If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted? The object of the British government must have been to protect all her subjects holding lands in America from the disability of alienage, in respect to descents and sales. The class of American loyalists could at least, in her eyes, have been in as much favour as any other; there is nothing in our public policy which is

(a) See also Bac. Abridg. Alien A. Cro. Car. 601, 602. 4 Term Rep. 300. Brook Abr. Denizen, 21. Jackson vs. Lunn, 3 Johns. Cas. 109.

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more unfavourable to them than to other British subjects. After the peace of 1783 we had no right or interest in future confiscation; and the effect of alienage was the same in respect to us, whether the British subject was a native of Great Britain or of the colonies. This part of the stipulation then being for the benefit of British subjects who became aliens by the events of the war; there is no reason why all persons should not be embraced in it, who sustained the character of British subjects, although we might also have treated them as American citizens. The argument supposes that because we should treat them as citizens, therefore Great Britain had no right to insist upon their being British subjects within the protection of the treaty. Now, if they were in truth and in fact, upon principles of public and municipal law, British subjects, she has an equal right to require us to recognize them as such. It cannot be doubted that Mrs Shanks might have inherited any lands in England, as a British subject, and her heirs might have taken such lands by descent from her. It seems to us, then, that all British born subjects whose allegiance Great Britain has never renounced, ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words, of the treaty of 1794.

In either view of this case, and we think both are sustained by principles of public law, as well as of the common law, and by the soundest rules of interpretation applicable to treaties between independent states, the objections taken to the right of recovery of the plaintiffs cannot prevail.

Upon the whole, the judgment of the court is, that the plaintiffs in error are entitled to the moiety of the land in controversy, which came by descent to their mother, Ann Shanks, and of course to the proceeds thereof; and that the decree of the state court of appeals ought to be reversed; and the cause remanded, with directions to enter a decree in favour of the plaintiffs in error.

Mr Justice JOHNSON, dissenting.

This cause comes up from the state court of South Carolina.

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The question is whether the plaintiffs can inherit to their mother. The objection to their inheriting is, that they are aliens, not born in allegiance to the state of South Carolina, in which the land lies. From the general disability of aliens they would exempt themselves. 1. On the ground that their mother was a citizen born, and in that right, though born abroad, they can inherit under the statute of Edward III. 2. That if not protected by that statute, then that their mother was a British subject, and that she and her heirs are protected as to this land by the treaties of 1783 and 1794.

The material facts of their case are, that their mother and her father were natives born of the province of South Carolina, before the declaration of independence; that in 1781, while Charleston and James Island, where the land lies and she and her father resided, were in possession of the British, their mother married their father, a British officer. That the descent was cast in 1782; and in December of that year, when the town was evacuated, she went to England with her husband, and resided there until her death in 1801; in which interval the appellants were born in England.

There is no question about the right of the appellees, if the right of the appellants cannot be maintained.

The first of the grounds taken below, to wit, the statute of Edward III. was not pressed in argument here, and must be regarded as abandoned. The second requires therefore our sole attention.

Was Mrs Shanks to be regarded as a British subject, within the meaning of our treaties with Great Britain? If so, then the land which was acquired in 1782, has the peculiar incident attached to it of being inheritable by aliens, subjects of Great Britain.

Until the adoption of the federal constitution, titles to land, and the laws of allegiance, were exclusively subjects of state cognizance. Up to the time therefore when this descent was cast upon the mother, the state of South Carolina was supreme and uncontrollable on the subject now before us.

By the adoption of the constitution, the power of the states in this respect was subjected to some modification. But

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although restrained in some measure from determining who cannot inherit, I consider her power still supreme in determining who can inherit. On this subject her own laws and her own courts furnish the only rule for governing this or any other tribunal.

By an act of the state passed in 1712, the common law of Great Britain was incorporated into the jurisprudence of South Carolina. In the year 1782, when this descent was cast, it was the law of the land; and it becomes imperative upon these appellants, after admitting that their parent was a native born citizen of South Carolina, daughter of a native born citizen of South Carolina, to show on what ground they can escape from the operation of these leading maxims of common law. *Nemo potest exire patriam*;—and *proles sequitur sortem paternam*.

The unyielding severity with which the courts of Great Britain have adhered to the first of these maxims in Dr Storie's case, furnished by sir Mathew Hale, and in *Aeneas M'Donald's* case, to be found in Foster, leaves no ground of complaint for its most ordinary application in the case of descent, and its most liberal application when perpetuating a privilege.

The treaty of peace can afford no ground to the appellants, nor the construction which has extended the provisions of that treaty to the case of escheat; for the question here is not between the alien and the state, but between aliens and other individual claimants. The words of the sixth article of the treaty of 1783 are the same as those in the preliminary treaty of 1782. “*There shall be no future confiscations made, or future prosecutions commenced against any person or persons by reason of the part which he or they may have taken in the present war.*”

Conceding that escheat may be comprised under confiscation; a decision between individuals claiming under no act of force imputable to the state, cannot possibly be considered under that term.

Nor will her case be aided by the following words of that article: to wit, “*nor shall any person on that account (the part which he or they may have taken in the present war) suf-*

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fer any future loss or damage either in person, liberty, or property." The decision of the state court gives the most liberal extension possible to this provision of the treaty, since it declares that Mrs Shanks never was precluded by any act of hers from claiming this property. It never entered into the minds of that court, that the very innocent act of marrying a British officer, was to be tortured into "taking a part in the present war;" nor that following that officer to England and residing there under coverture, was to be imputed to her a cause of forfeiture.

I consider it very important to a clear view of this question, that its constituents or several members should be viewed separately.

The state court has not pretended to impugn the force of the treaty of 1794, or denied the obligation to concede every right that can be fairly and legally asserted under it; but has only adjudged that the case of the appellants is not one which on legal grounds of construction can be brought within its provision.

The words of the treaty are: "it is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty," shall continue to hold and transmit to their heirs, &c.

The decision of the state court which we are now reviewing, presents two propositions:

1. That Mrs Shanks was in the year 1782, when the descent was cast, and continued to be in 1794, when the treaty was ratified, a citizen of South Carolina.

2. That she was not a British subject in the sense of the treaty.

As to the first of these two propositions, I consider it as altogether set at rest by the decision itself; it is established by paramount authority; and this court can no more say that it is not the law of South Carolina, than they could deny the validity of a statute of the state passed in 1780, declaring that to be her character, and those her privileges.

The only question, therefore, that this court can pass upon is, whether, being recognized under that character, and pos-

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sessing those rights, she is still a British subject within the provisions of the treaty.

It is no sufficient answer to this question, that it cannot be denied that Mrs. Shanks was a British subject. She was so in common with the whole American people. The argument therefore proves too much, if it proves any thing; since it leads to the absurdity of supposing that Great Britain was stipulating for the protection of her enemies, and imposing on us an obligation in favour of our own citizens.

It also blends and confounds the national character of those, to separate and distinguish whom was the leading object of the treaty of 1783.

It cannot be questioned that the treaty of 1783 must have left Mrs Shanks a British subject, or the treaty of 1794 cannot aid her offspring. And the idea of British subject under the latter treaty, will be best explained by reference to its meaning in that of 1783. The two treaties are in pari materia.

The provisions of the third article show that persons who come within the description of *People of the United States*, were distinguished from subjects of Great Britain. That article stipulates for a right in the people of the United States to resort to the gulph of St Lawrence for fishing; a stipulation wholly nugatory, if not distinguishable from subjects of Great Britain.

The fifth article is more explicit in the distinction. It first contains a provision in favour of *real British subjects*, then one in favour of persons resident in districts in possession of his majesty's arms; and then stipulates that *persons of any other description* shall have liberty to go to and remain twelve months in the United States to adjust their affairs. These latter must have included the loyalists who had been banished or in any way subjected to punishment, who are explicitly distinguished from real British subjects, and thus classed, in order to avoid the question to whom their allegiance was due, or rather, because, by the same treaty, the king having renounced all claim to their allegiance, could no longer distinguish them as British subjects.

Can those any longer be denominated British subjects

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whose allegiance the king of Great Britain has solemnly renounced?

I know of no test more solemn or satisfactory than the liability to the charge of treason; not by reason of temporary allegiance, for that is gone with change of domicil; were those who could claim the benefit of the king's renunciation to the colonies, subject to any other than temporary allegiance, while commorant in Great Britain? I say they were not. Their right to inherit is not a sufficient test of that liability as to other nations, for that right results from a different principle, the exemption of a British subject from being disfranchised, while free from crime.

Was Mrs Shanks an individual to whose allegiance the king had renounced his claim?

The commencement of the revolution found us all indeed professing allegiance to the British crown, but distributed into separate communities; altogether independent of each other, and each exercising within its own limits sovereign powers, legislative, executive and judicial. We were dependent it is true upon the crown of Great Britain, but as to all the world beside, foreign and independent. It lies then at the basis of our revolution, that when we threw off our allegiance to Great Britain, every member of each body politic stood in the relation of subject to no other power than the community of which he then constituted a member. Those who owed allegiance to the king, as of his province of South Carolina, thenceforward owed allegiance to South Carolina. The courts of this country all consider this transfer of allegiance as resulting from the declaration of independence; the British from its recognition by the treaty of peace. But as to its effect, the British courts concur in our view of it. For, in the case of *Thomas vs. Acklam*, 2 B. & C. 229, the language of the British court is this: "a declaration that a state shall be free, sovereign and independent, is a declaration that the people composing that state shall no longer be considered as the subjects of that sovereign by whom the declaration is made."

From the previous relations of the colonies and mother country, it is obvious that the declaration of independence

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must have found many persons resident in the country besides those whose allegiance was marked by the unequivocal circumstance of birth; many native born British subjects voluntarily adhered to the Americans, and many foreigners had by settlement, pursuits or principles, devoted themselves to her cause.

Whatever questions may have arisen, as to the national character or allegiance of these; as to the case under review, which is that of a native born citizen of South Carolina, there would be no doubt. And the courts of that state have put it beyond a doubt, that the revolution transferred her allegiance to that state.

Whoever will weigh the words "real British subjects," used in the fifth article, and consider the context, can come to but one conclusion: to wit, that it must mean British subjects to whose allegiance the states make no claim. "Estates that have been confiscated belonging to real British subjects" are the words. Now it is notorious, that although, generally speaking, the objects of those confiscations were those to whose allegiance the states laid claim, yet in many instances the estates of British subjects resident in England or this country, or elsewhere, were confiscated, because they were British subjects, on the charge of adhering to the enemy. But if the right of election had ever been contemplated, why should the term *real* have been inserted. The loyalists were British subjects, and had given the most signal proofs of their election to remain such. What possible meaning can be attached to the term *real*, unless it raised a distinction to their prejudice? And historically, we know that Great Britain acknowledged their merits by making large provisions for their indemnification; because for them there was no provision made for restoring their property.

It has been argued that the British courts, in construing the treaty of peace, have recognised this right of election, and the case of *Thomas vs. Acklarn*, before cited, is supposed to establish it. But a very little attention to that case will prove the contrary. It is in fact the converse of the present case.. Mrs Thomas was the daughter of Mr Ludlow, an American citizen born before the revolution, and was born

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in America long after the separation. So that her alien character was unquestionable, unless protected by the statute of Geo. II. explaining those of Anne and Edward. The decision of the court of king's bench is, that to bring herself within the provisions of the statute, her father must be shown at her birth to have been both a *native born* and a *subject* of Great Britain; that by the treaty of peace, the king had renounced all claim to his allegiance, and his subsequent residence in America proved his acceptance of that renunciation.

But when did South Carolina renounce the allegiance of Mrs Shanks? We have the evidence of the states having acquired it; when did she relinquish it? Or if it be placed on the footing of an ordinary contract, when did South Carolina agree to the dissolution of this contract? Or when did she withdraw her protection, and thus dissolve the right to claim obedience or subjection?

It is true, the treaty of 1794 drops the word *real*, and stipulates generally for British subjects and American citizens; construing the two treaties as instruments in pari materia. This circumstance is of little consequence; and however we construe it, the argument holds equally good, that the treaty could have been only meant to aid those who needed its aid, not those who were entitled under our own laws to every right which the treaty meant to secure; that is, those whose alien character prevented their holding lands, unless aided by some treaty or statute. Mrs Shanks was not of this character or description; her right at all times to inherit has been recognized by paramount authority. But it is contended, that it was at her election whether to avail herself of her birthright as a citizen of the state, or her birthright as a subject of Great Britain.

To this there may be several answers given. And first, the admission of this right would make her case no better under the construction of the treaty; for, having no need of its protection, as has been authentically recognized by the state decision, it cannot be supposed that she was an object contemplated by the treaty; she was not a British subject in

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the sense of those treaties, especially if the two treaties be construed on the principle of instruments in pari materia.

Secondly, if she had the right of election, at what time did she exercise it? for she cannot claim under her election, and against her election. If she exercised it prior to her father's death, then was she an alien at his death, and could not take even a right of entry by descent, as has been distinctly recognized in *Hunter vs. Fairfax*, 7 Cranch, 619; and I think in some other cases. She then had nothing for the treaty to act upon.

But if her election was not complete until subsequent to her father's death, then it is clearly settled, that taking the oath of allegiance to a foreign sovereign produces no forfeiture, and she still had no need of a treaty to secure her rights to land previously descended to her. If the facts be resorted to, and the court is called upon to fix the period of her transit, it would be obliged to confine itself to the act of her marrying against her allegiance. It is the only free act of her life stated upon the record, for from thence she continued sub potestate viri; and if she or her descendants were now interested in maintaining her original allegiance, we should hear it contended, and be compelled to admit, that no subsequent act of her life could be imputed to her because of her coverture; and even her marriage was probably during her infancy.

But lastly, I deny this right of election altogether, as existing in South Carolina, more especially at that time.

I had this question submitted to me on my circuit some years since, and I then leaned in favour of this right of election. But more mature reflection has satisfied me, that I then gave too much weight to natural law, and the suggestions of reason and justice; in a case which ought to be disposed of upon the principles of political and positive law, and the law of nations.

That a government cannot be too liberal in extending to individuals the right of using their talents and seeking their fortunes wherever their judgments may lead them, I readily agree. There is no limit short of its own security, to which

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a wise and beneficent government would restrict its liberality on this subject. But the question now to be decided is of a very different feature ; it is not one of expediency, but of right. It is, to what extent may the powers of government be lawfully exercised in restraining individual volition on the subject of allegiance ; and what are the rights of the individual when unaffected by positive legislation.

As the common law of Great Britain is the law of South Carolina, it would here perhaps be sufficient to state that the common law altogether denies the right of putting off allegiance. British subjects are permitted, when not prohibited by statute (as is the case with regard to her citizens), to seek their fortunes where they please, but always subject to their natural allegiance. And although it is not regarded as a crime to swear allegiance to a foreign state, yet their government stands uncommitted in the subject of the embarrassments in which a state of war between the governments of their natural and that of their adopted allegiance may involve the individual. On this subject the British government acts as circumstances may dictate to her policy. That policy is generally liberal ; and as war is the calling of many of her subjects, she has not been rigorous in punishing them even when found with arms in their hands, where there has been no desertion, and no proclamation of recall. The right however to withdraw from their natural allegiance is universally denied by the common law.

It is true that, without any act of her own, Mrs Shanks found herself equally amenable to both governments under the application of this common law principle. But from this only one consequence followed, which is, that so far as related to rights to be claimed or acquired, or duties to be imposed under the laws of either government, she was liable to become the victim of the will or injustice of either.

If we were called upon to settle the claims of the two governments to her allegiance, upon the general principles applicable to allegiance even as recognized by the contending governments, we should be obliged to decide that the superior claim was in South Carolina. For, although before the revolution a subordinate state, yet it possessed every

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attribute of a distinct state; and upon principles of national law, the members of a state or political entity continue members of the state notwithstanding a change of government. The relations between the body politic and its members continue the same. The individual member and the national family remain the same, and every member which made up the body, continues in the eye of other nations in his original relation to that body. Thus we see that the American government is at this day claiming indemnity of France for the acts of those who had expelled the reigning family from the throne, and occupied their place.

But it is obvious, that although the common law be the law of South Carolina, and its principles are hostile to the right of putting off our national allegiance; the constitution and legislative acts of South Carolina, when asserting her independence, must be looked into to determine whether she may not then have modified the rigour of the common law, and substituted principles of greater liberality.

South Carolina became virtually independent on the 4th of June 1775. The association adopted by her provincial congress on that day, constituted her in effect an independent body politic; and if in international affairs, the fact of exercising power be the evidence of legally possessing it, there was no want of facts to support the inference there; for officers were deposed, and at one time the most influential men in the state were banished under the powers assumed and exercised under that association. It required the indiscriminate subscription and acquiescence of all the inhabitants of the province, under pain of banishment.

Neither of the constitutions adopted in 1776 or 1778 contains any definition of allegiance, or designation of the individuals who were held bound in allegiance to the state; but the legislative acts passed under those constitutions, will sufficiently show the received opinion on which the government acted in its legislation upon this subject.

Neither the ordinance for establishing an oath of abjuration and allegiance, passed February 13, 1777, nor the act of March 28, 1778, entitled "an act to oblige every free male inhabitant of this state, above a certain age, to give

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assurance of fidelity and allegiance to the same," holds out any idea of the right of election. The first requires the oath to be taken by any one to whom it is tendered, and the last requires it to be taken by every male inhabitant above sixteen, under pain of perpetual banishment.

The preamble to the latter act indeed admits that protection and allegiance are reciprocal; but the whole course of its legislation shows that the legislature understands the right of election to belong to the state alone, and an election to withdraw allegiance from the state as a crime in the individual. The eleventh, or penal clause, is very explicit on this subject. It runs thus: "that if any person refusing or neglecting to take the oath prescribed by this act, and withdrawing from this state, shall return to the same, then he shall be adjudged guilty of *treason* against this state, and shall, upon conviction thereof, suffer death as a traitor."

Now, therefore, where there is no allegiance, there can be no treason.

Since, then, the common law of England was the law of allegiance and of descents in South Carolina, when this descent was cast upon the mother, and since remained unaltered by any positive act of legislation of the only power then possessing the right to legislate on the subject; it follows that the representatives of Mrs Shanks can derive no benefit from her election; unless the right to elect is inherent and unalienable in its nature, and remains above the legislative control of society, notwithstanding the social compact.

All this doctrine I deny. I have already observed that governments cannot be too liberal in extending the right to individuals; but as to its being unalienable, or unaffected by the social compact, I consider it to be no more so than the right to hold, devise, or inherit the lands or acquisitions of an individual. The right to enjoy, transmit, and inherit the fruits of our own labour, or of that of our ancestors, stands on the same footing with the right to employ our industry wherever it can be best employed; and the obligation to obey the laws of the community on the subject of the right to emigrate, is as clearly to be inferred from the reason and

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nature of things, as the obligation to use or exercise any other of our rights, powers, or faculties, in subordination to the public good. There is not a writer who treats upon the subject, who does not qualify the exercise of the right to emigrate, much more that of putting off or changing our allegiance, with so many exceptions as to time and circumstances, as plainly to show that it cannot be considered as an unalienable or even perfect right. A state of war, want of inhabitants, indispensable talents, transfer of knowledge and wealth to a rival, and various other grounds, are assigned by writers on public law, upon which a nation may lawfully and reasonably limit and restrict the exercise of individual volition in emigrating or putting off our allegiance. All this shows, that whenever an individual proposes to remove, a question of right or obligation arises between himself and the community, which must be decided on in some mode. And what other mode is there but a reference to the positive legislation or received principles of the society itself? It is therefore a subject for municipal regulation; and the security of the individual lies in exerting his influence to obtain laws which will neither expose the community unreasonably on the one hand, nor restrain one individual unjustly on the other.

Nor have we any thing to complain of in this view of the subject. It is a popular and flattering theory, that the only legitimate origin of government is in compact, and the exercise of individual will. That this is not practically true, is obvious from history; for, excepting the state of Massachusetts, and the United States, there is not perhaps on record, an instance of a government purely originating in compact. And even here, probably, not more than one third of those subjected to the government had a voice in the contract. Women, and children under an age arbitrarily assumed, are necessarily excluded from the right of assent, and yet arbitrarily subjected. If the moral government of our maker and our parents is to be deduced from gratuitous benefits bestowed on us, why may not the government that has shielded our infancy claim from us a debt of gratitude to be repaid after manhood? In the course of nature, man has need

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of protection and improvement long before he is able to reciprocate these benefits. These are purchased by the submission and services of our parents; why then should not those to whom we must be indebted for advantages so indispensable to the development of our powers, be permitted, to a certain extent, to bind us apprentice to the community from which they have been and are to be procured?

If it be answered that this power ought not to be extended unreasonably, or beyond the period when we are capable of acting for ourselves; the answer is obvious,—by what rule is the limit to be prescribed, unless by positive municipal regulation?

It is of importance here, that it should be held in view that we are considering political, not moral obligations. The latter are universal and immutable, but the former must frequently vary according to political circumstances. It is the doctrine of the American court, that the issue of the revolutionary war settled the point, that the American states were free and independent on the 4th of July 1776. On that day, Mrs Shanks was found under allegiance to the state of South Carolina, as a natural born citizen to a community, one of whose fundamental principles was that natural allegiance was unalienable; and this principle was at no time relaxed by that state, by any express provision, while it retained the undivided control over the rights and liabilities of its citizens.

But it is argued that this lady died long after the right of passing laws of naturalization was ceded to the United States, and the United States have in a series of laws admitted foreigners to the right of citizenship, and imposed an oath which contains an express renunciation of natural and every other kind of allegiance. And so of South Carolina; she had previously passed laws to the same effect. In 1704 she passed a law "for making aliens free of this province," which remained in force until 1784, when it was superseded by the act of the 26th of March, "to confer the right of citizenship on aliens;" to which succeeded that of the 22d of March 1786, entitled "an act to confer certain

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rights and privileges on aliens, and for repealing the act therein mentioned."

In both the latter acts the oath of allegiance is required to be taken; and that oath, as prescribed by the act of the 28th of March 1778, contains an abjuration of allegiance to any other power, and particularly to the king of Great Britain.

These legislative acts, it cannot be denied, do seem to hold out the doctrine of the right to change our allegiance, and do furnish ground for insisting, that it is absurd in a government to deny to its own citizens, the right of doing that which it encourages to be done by the citizens of other states.

Most certainly it is to be regretted that congress has not long since passed some law upon the subject, containing a liberal extension of this right to individuals, and prescribing the form and circumstances under which it is to be exercised, and by which the act of expatriation shall be authenticated. A want of liberality in legislating on this subject might involve the government in inconsistency; but the question here is whether, in absence of such declaration of the public will or opinion, courts of justice are at liberty to fasten upon the government, by inference, a doctrine negatived by the common law, and which is in its nature subject to so many modifications.

I think not. Great Britain exercises the same power either by the king's patent or by legislative enactment; and permanent laws exist in that country which extend the rights of naturalization to men by classes, or by general description. Yet this implication has never been fastened upon her; nor is the doctrine of her common law less sternly adhered to, or less frequently applied, even to the utmost extent of the punishing power of her courts of justice. In practice she moderates its severities; but in this it is will and policy that guides her, not any relaxation of the restriction upon individual rights.

There is indeed one prominent difficulty hanging over this argument which it is impossible to remove. If it proves

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any thing, it proves too much ; since the inference, if resulting at all, must extend to put off one's allegiance, as well to adopted citizens as to natural born citizens ; and to all times and all circumstances. What then is that obligation, that allegiance worth, which may be changed an hundred times a day ? or by passing over from one army to another, perhaps in the day of battle ? The truth is, it leaves but a shadow of a tie to society, and converts that which is considered as one of the most sacred and solemn obligations that can be entered into, although confirmed by the sanctity of an oath, into nothing but an illusory ground of confidence between individuals and their governments.

The idea brings man back to a state of nature ; at liberty to herd with whom he pleases, and connected with society only by the caprice of the moment.

Upon the whole I am of opinion, that Mrs Shanks continued, as she was born, a citizen of South Carolina ; and of course unprotected by the British treaty.

I have taken a general view of the subject, although it does not appear precisely whether or not Mrs Shanks had attained an age sufficiently mature to make an election before marriage, or was ever discovert during her life, so as to be able to elect after marriage. I have reasoned on the hypothesis most favourable to her, admitting that she had made an election in authentic form. Nor have I confined myself to authority ; since I wished, as far as I was instrumental, to have this question settled on principle. But it does appear to me, that in the case of Coxe vs. M'Ilvaine, this court has decided against the right of election most expressly ; for if ever the exercise of will or choice might be inferred from evidence, it is hardly possible for a stronger case to be made out than that which is presented by the facts in that case.

With regard to state decisions upon this question, I would remark, that it is one so exclusively of state cognizance, that the courts of the respective states must be held to be best acquainted with their own law upon it. Though every other state in the union, therefore, should have decided differently from the state of South Carolina, their decisions could only determine their own respective law upon this subject, and

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could not weaken that of South Carolina with regard to her own law of allegiance and descents. It does appear singular, that we are here called upon to overrule a decision of the courts of South Carolina, on a point on which they ought to be best informed, and to decide an individual to be a British subject, to whose allegiance the British courts have solemnly decided the king has no claim. On this point the case of Ludlow, in *Thomas vs. Acklam*, is the case of Mrs Shanks; it is impossible to distinguish them. The state of South Carolina acknowledges her right to all the benefits of allegiance; the king of Great Britain disavows all claim to her allegiance; and yet we are called upon to declare her a British subject.

I have not had opportunity for examining the decisions of all the states upon this subject, but I doubt not they will generally be found to concur in principle with the court of South Carolina, except so far as they depend upon local law. This is certainly the case in Massachusetts. The decision in the case of *Palmer vs. Downer*, does, it is true, admit the right of the election; but besides that that case is very imperfectly, and I may add unauthentically reported, it is most certainly overruled in the subsequent case of *Martin vs. Woods*.

Before I quit the cause it may be proper to notice a passage in a book recently published in this country, and which has been purchased and distributed under an act of congress; I mean Gordon's Digest. There is no knowing what degree of authority it may be supposed to acquire by this act of patronage; but if there is any weight in the argument in favour of expatriation drawn from the acts of congress on that subject, I presume the argument will at some future time be applied to the doctrines contained in this book. If so, it was rather an unhappy measure to patronise it; since we find in it a multitude of nisi prius decisions, obiter dicta, and certainly some striking misapprehensions, ranged on the same shelf with acts of congress. On the particular subject now under consideration, art. 1649, we find the following sentence: "Citizens of the United States have a right to expatriate themselves in time of war as well as in

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time of peace, until restrained by congress;" and for this doctrine the author quotes *Talbot vs. Jansen*, 3 Dall. and the case of the *Santissima Trinidad*, 7 Wheat. 348; in both which cases the author has obviously mistaken the argument of counsel for the opinion of the court; for the court in both cases expressly wave expressing an opinion, as not called for by the case, since if conceded, the facts were not sufficient to sustain the defence.

The author also quotes a case from 1 Peters's C. R. which directly negatives the doctrine, and a case from 4 Hall's Law Journal, 462, which must have been quoted to sustain the opposite doctrine. It is the case of the *United States vs. Williams*, in which the chief justice of the United States presided, and in which the right of election is expressly negatived, and the individual who pleaded expatriation is convicted and punished.

This cause came on to be heard on the transcript of the record from the supreme court of appeals in law and equity in and for the state of South Carolina, and was argued by counsel; on consideration whereof, it is considered and declared by this court that Ann Shanks, the mother of the original defendants, was at the time of her death a British subject, within the true intent and meaning of the ninth article of the treaty of amity, commerce and navigation made between his Britannic majesty and the United States of America on the 19th of November 1794, and that the said original defendants, as her heirs and British subjects, are capable to take, and did take by descent from her the moiety of the land in the proceedings mentioned, and are entitled to the proceeds of the sale thereof, now in the registry of the circuit court of equity, as in the said proceedings mentioned. It is therefore considered and adjudged by this court, that there is error in the decree of the said court of appeals in equity, of the state of South Carolina, in affirming the decree of the circuit court, in said proceedings mentioned, whereby it was ordered and decreed, that the money arising from the sale of the land in question, theretofore re-

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served subject to the order of the court, be paid over to the petitioners, as the only heirs who are capable of taking the same. And it is further ordered and adjudged by this court, that for this cause the decree of the circuit court aforesaid, and of the court of appeals aforesaid be, and each of them is hereby reversed. And it is further ordered and adjudged by this court, that the cause be remanded to the said court of appeals, with directions that a decree be entered therein, that the said moiety of the said proceeds of the said sale be paid over to the original defendants (the present plaintiffs in error) as their right, and that such further proceedings be had therein as to justice and equity may in the premises appertain.

JAMES D. WOLF vs. GEORGE F. USHER.

Where the point on which the judges of the circuit court divided in opinion was not certified, but the point of difference was to be ascertained from the whole record, the court refused to take jurisdiction of the case.

This cause came before the court on a certificate of a division between the judges of the circuit court of the district of Rhode Island.

When the case was opened by the counsel for the plaintiff, it was found on inspecting the record, that the particular point on which the judges of the circuit court had differed, was not certified. The whole record had been sent up, and it contained a certificate that the judges of the court had differed in opinion, without a specific statement of what the difference was.

The court refused to take jurisdiction of the cause, and remanded the same to the circuit court of Rhode Island, with directions to proceed therein according to law.

Mr Coxe, for plaintiff; Mr Whipple, for defendant.

WILLIAM M'CLUNY, PLAINTIFF IN ERROR vs. WYLLIS SILLIMAN,
DEFENDANT IN ERROR.

The plaintiff sued the defendant, as register of the United States land office in Ohio, for damages, for having refused to note on his books applications made by him for the purchase of land within his district. The declaration charged the register with this refusal, the lands had never been applied for nor sold, and were at the time of the application liable to be so applied for and sold. The statute of limitations is a good plea to the suit.

It is a well settled principle that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction. [276]

Under the thirty-fourth section of the judiciary act of 1799, the acts of limitations of the several states, where no special provision has been made by congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts. [277]

Construction of the statute of limitations of the state of Ohio. [278]

Where the statute of limitations is not restricted to particular causes of action, but provides that the action, by its technical denomination, shall be barred if not brought within a limited time, every cause for which such action may be prosecuted is within the statute. [278]

In giving a construction to the statute of limitations of Ohio, the action being barred by its denomination, the court cannot look into the cause of action. They may do this in those cases where actions are barred for causes specified in the statute; for the statute only operates against such actions, when prosecuted on the grounds stated. [278]

Of late years the courts in England and in this country have considered statutes of limitations more favourably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction, to evade the effect of those statutes. By requiring those who complain of injuries to seek redress by action at law within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation. [278]

ERROR to the circuit court of Ohio.

In the circuit court of Ohio, the plaintiff in error instituted a suit on the 15th of December 1823, against the defendant, who was register of the United States land office at Zanesville, to recover damages for having, as register, refused to enter an application in the books of his office, for certain lands in his district; the entry having been required to be made according to the provisions of the tenth section of the act of congress, passed the 18th of May 1796, entitled "an

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act providing for the sale of the lands of the United States, in the territory north west of the river Ohio, and above the mouth of the Kentucky river." The declaration charges, that the register, on the 2d of August 1810, refused to enter the application, although the lands had never been legally applied for or sold, and were then liable to be applied for and sold.

The defendant pleaded not guilty, and not guilty within six years before the commencement of the suit. To the latter plea there was a demurrer, and joinder in demurrer. The circuit court overruled the demurrer, and sustained the plea of the statute of limitations. The plaintiff prosecuted this writ of error; and sought to reverse the judgment on the grounds:

1. That the statute of limitations does not apply to an action upon the case brought for an act of nonfeasance or misfeasance in office.

2. That no statute of limitations of the state of Ohio, then in force, is pleadable to an action upon the case brought by a citizen of one state against a citizen of another, in the circuit court of the United States for malfeasance or nonfeasance in office, in a ministerial officer of the general government; and especially where the plaintiff's rights accrued to him under a law of congress.

Mr Doddridge, for the plaintiff in error, argued, that there are many cases within the words of the statute of 21 James I. ch. 16, for limitation of personal actions, which are not within its meaning; as debt against a sheriff for an escape; debt against a sheriff for money levied; actions ex maleficio; debt for not setting out tithes under the statute, although founded on the highest record, an act of parliament; debt on award, although founded on contract. 1 Saund. Rep. tit. Statute. 5 Bac. 509. 2 Lev. 191. Esp. N. P. 653.

Out of the clause limiting actions for words, are excepted, slander of title; scandalum magnatum. Cro. Ch. 141. Esp. N. P. 519.

The statute does not extend to trusts, to charities or to

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legacies. 3 Bac. Ab. 510. 2 Lord Ray. 852, 935. 1204. Salk. 361, pl. 11. 5 Mod. 308. 1 Wash. 145. 4 Munf. 222.

Statutes of limitation are *leges fori*; and it rests with the sovereign power of the state to say how far the interests of the society it represents require that its own courts shall be kept open to give redress in each particular case, or whether there shall be any limitation of personal actions. It peculiarly belongs to each government to say how long its ministerial officers shall be exposed to the claims of those who consider themselves aggrieved by their acts of misfeasance or nonfeasance; consequently, in such cases, the statutes of limitation of one state cannot be pleaded in bar in the courts of another state. 2 Mass. 84. 1 Caines, 402. 3 Johns. 261, 263. 2 Johns. 198. 2 Vern. 540. 13 East, 439, 450. 7 Mass. 515. 3 Johns. Ch. Rep. 217, 219. 17 Mass. 55.

Neither in Virginia, nor in Pennsylvania, nor in New York, are cases found of a plea of the statute of limitations in an action arising ex maleficio. It is claimed, that the right to such a plea does not exist in the courts of either of those states. There are no cases in this court. In all those in which the plea of the statute of limitations has been sustained, the statutes of the state have been pleaded to suits in the federal courts. 2 Cranch, 272, 1 Condensed Rep. 411. Hopkirk *vs.* Bell, 3 Cranch, 454, 1 Condensed Rep. 595. Mandeville et al. *vs.* Wilson. 5 Cranch, 15. 7 Cranch, 156. 8 Cranch, 84. 3 Wheat. 541. 5 Wheat. 124. 6 Wheat. 481, 497.

The nature of the case prevents there being a state decision in affirmance of the principles claimed for the plaintiff in error. The question is no more or less than this: where a duty is created by an act of congress, to be performed by a ministerial officer of the general government, for the benefit of a citizen of another state, whose rights grow out of the same law, and the injured party, as a citizen of another state, sues the officer in a federal court for malfeasance or for nonfeasance; can that officer plead in bar a statute of the state made for the protection of *its own* ministerial officers?

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The circuit court in the trial of civil actions arising under the law of a state, or cognizable by its courts, where a citizen of another state or a foreigner is plaintiff, act precisely as a state court, and is bound to interpret and enforce its laws as they are made to operate in the state courts.

If the law of Ohio can be pleaded at all, it is the act of the 24th of January 1810, which went into operation the 1st of June 1810; the act which is the cause of action in this suit having been done in August 1810. That law, 4 Ohio Laws, page 62, sect. 1, provides "that all actions of trespass for assault, menace, battery, or wounding, actions of slander for words spoken or libel, or false imprisonment, shall be brought within one year next after the cause of such actions or suits; and all actions upon book accounts, and for forcible entry and detainer, shall be brought within four years next after the cause of such actions and suits; and all actions of trespass upon real property, trespass, detinue, trover and conversion, and replevin, all actions on the case, or of debt for rent, shall be sued or brought within six years next after the cause of such action arose."

This act is not a copy of the statute of James I. ch. 16; and all the objections that would urge the exemption of suits, *ex maleficio*, from that statute, may be presented under the law of Ohio; other exceptions may also be claimed. "Actions on the case" are associated with actions arising *ex contractu*; and thus actions arising out of contract are only intended to be provided for—nothing is said in the law of actions *ex maleficio*.

If actions of this kind are embraced by the act of 1810, they are only so by a forced construction of the words "actions on the case," associated and classed in the same statute with various actions arising *ex contractu*: while in a subsequent law of Ohio, passed in 1824, they are described in express terms, and naturally associated in the same sentence with various other actions, arising *ex delicto*.

But if these actions are embraced in the act of 1810, they must be such only as may be prosecuted against officers of the state. Actions against officers of the United States were not in the view or contemplation of the legislature of

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Ohio when the law was enacted, nor did they intend to afford protection to any officer but one of the state. Certainly the legislature had not before them the protection of the registers of the United States land office, from suits for a violation of duties by which the citizens of Ohio might be injured.

To apply the regulations of the several states to such cases, would produce the absurdity and injustice of different laws, and different limitations existing in different states. If the power of state legislatures to limit actions against officers of the United States is admitted, the power over those officers might be exercised in other and in oppressive legislative provisions.

The statute of Ohio cannot be enlarged by construction, so as to apply it to things not properly within state control, nor within the intention contemplated by those who enacted it.

Mr Berrien, attorney general, for the defendant in error, contended; that the application and authority of state statutes of limitations to suits in the circuit courts of the United States, had been frequently decided in this court. What may have been the intention of the legislatures of the states in enacting limitation laws is not inquired into, and is not material; the only question is, whether the law applies to the case. *Faw vs. Roberdeau*, 3 Cranch, 174, 1 Condensed Rep. 483. *Hopkirk vs. Bell*, 3 Cranch, 454, 1 Condensed Rep. 595. *Marsteller vs. M'Clean*; 7 Cranch, 156, 158. *King vs. Riddle*, 7 Cranch, 168. *Bond vs. Jay*, 7 Cranch, 350. *Clementson vs. Williams*, 8 Cranch, 72, &c.

It is admitted that this action was not commenced within six years, and that it is in its nature an action which would be within the operation of the law of Ohio, unless a construction shall be given to that law different from the general and usual import of its terms.

The argument, that the association of the action on the case with debt for rent, proves that pecuniary actions were only to be barred, will not be found correct; as "forcible entry and book accounts" are in the same association.

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The plain and obvious construction of the law is that which has been given by the circuit court. The different kinds of action, and causes of action upon which the limitations of the law were intended to operate, were in the view and purpose of the legislature of Ohio; the association or classification was not because the cases were analogous, or had an affinity one to the other, but because of the intention that the action of the statute should be the same as to time on each of the members of the class.

The words of the statute of Ohio being general, unless the officers under the government of the United States are especially exempted, they may avail themselves of its provisions.

Cited, 2 Stark. on Ev. 901. 1 Saund. 37. 3 Bacon, 509. Ballantine on Limitations, 88.

Mr Justice M'LEAN delivered the opinion of the Court : This suit was brought by the plaintiff against the defendant, as register of the United States land office at Zanesville, in the district of Ohio. The declaration charges, that on the 2d of August, in the year 1810, the plaintiff produced to the defendant, in his office of register, the receipts of the receiver of public moneys at that office, as follows, viz. one number three thousand two hundred and fifty-five, and another number three thousand two, hundred and fifty-six, amounting together to the sum of one hundred and ninety dollars eighty-nine cents of moneys paid by the plaintiff to the receiver, for the purchase of public lands in the said district, being the one-twentieth part of the purchase money for section number six, in township number twelve, and range number thirteen, and fraction number five, in the same township and range adjoining the said section ; and for section number twelve, and fraction number one, adjoining in township number thirteen, and range number fourteen of public lands within that district : and that the plaintiff then and there applied to the defendant for the purchase of the said lands, that is, each of the said sections with the fractions attached according to law, and requested that his applica-

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tion should be entered on the books of the defendant's office ; upon which application, the defendant informed the plaintiff that the said lands had been sold at Marietta, before the establishment of the land office at Zanesville ; and if not so sold there, that they had not been offered at public sale at Zanesville : whereupon the plaintiff insisted on his applications, and requested to have them entered, according to the provisions of the tenth section of the act of congress, approved the 18th of May 1796, entitled "an act providing for the sale of the lands of the United States, in the territory north west of the river Ohio, and above the mouth of Kentucky river." The declaration then charges, that the register refused to enter the application, although the lands had never been legally applied for nor sold, and were then liable to be applied for and sold. The damages are laid at fifty thousand dollars.

To this declaration the defendant pleaded not guilty, whereupon issue is joined ; and not guilty within six years before the commencement of the suit. To the latter plea there is a general demurrer, and joinder in demurrer. The circuit court of the United States for the district of Ohio overruled this demurrer, and sustained the plea of the statute of limitations ; and this writ of error is brought to reverse that decision.

For the plaintiff in error, it is contended :

1. That the statute of limitations does not apply to an action upon the case, brought for an act of nonfeasance or malfeasance in office.

2. That no statute of limitations of the state of Ohio, then in force, is pleadable to an action upon the case brought by a citizen of one state against a citizen of another, in the circuit court of the United States, for malfeasance or nonfeasance in office, in a ministerial officer of the general government, and especially where the plaintiff's rights accrued to him under a law of congress.

The decision in this cause depends upon the construction of the statute of Ohio, which prescribes the time within which certain actions must be brought. It is a well settled

[*M'Clinty vs. Silliman.*]

principle, that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction.

In the thirty-fourth section of the judiciary act of 1789, it is provided, "that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Under this statute, the acts of limitations of the several states, where no special provision has been made by congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts. The act in question provides, "that all actions hereinafter mentioned, shall be sued or brought within the time hereinafter limited; all actions of trespass for assault, menace, battery and wounding, actions of slander for words spoken or libel, and for false imprisonment, within one year next after the cause of such actions or suits; and all actions of book accounts, or for forcible entry and detainer, or forcible detainer, within four years after the cause of such action or suits; and all actions of trespass upon real property, trespass, detinue, trover and conversion and replevin, all actions upon the case, and of debt for rent, shall be sued or brought within six years next after the cause of such actions or suits."

It is contended, that this statute cannot be so construed as to interpose a bar to any remedy sought against an officer of the United States, for a failure in the performance of his duty: that such a case could not have been contemplated by the legislature; that the language of the statute does not necessarily embrace it; and consequently, the statute can only apply in cases of nonfeasance or malfeasance in office, to persons who act under the authority of the state, and are amenable to it.

It is not probable that the legislature of Ohio, in the passage of this statute, had any reference to the misconduct of an officer of the United States. Nor does it seem to have been their intention to restrict the provision of the statute

[*McCloskey vs. Silliman.*]

to any particular causes for which the action on the case will lie. In the actions of trespass, debt, and covenant specified, the particular causes of action barred by the statute are stated; but this is not done in the action on the case, nor is it done in the action of detinue, trover and conversion, and replevin.

Where the statute is not restricted to particular causes of action, but provides that the action, by its technical denomination, shall be barred, if not brought within a limited time, every cause for which the action may be prosecuted is within the statute.

If the statute required the action of debt for rent to be brought within six years from the time the cause of action arose, the bar could extend to no other action of debt. But, if the statute provided that all actions of debt should be prosecuted within six years, then it would operate against the action, for whatever cause it was brought.

The action on the case must be brought within six years from the time the cause of action arose, and it is immaterial what that cause may be; the statute bars the remedy, by this form of action, if it be not prosecuted within the time.

In giving a construction to this statute, where the action is barred by its denomination, the court cannot look into the cause of action. They may do this in those cases where actions are barred when brought for causes specified in the statute; for the statute only operates against such actions when prosecuted on the grounds stated.

By bringing his action on the case, the plaintiff has selected the appropriate remedy for the injury complained of. This remedy the statute bars. Can the court then, by referring to the ground of the action, take the case out of the statute.

The demurrer admits the plea of the statute; and as it declares, in express terms, that the action is barred, the court can give no other effect to it by construction.

Of late years the courts in England, and in this country, have considered statutes of limitations more favourably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, unless

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compelled by the force of former decisions, give a strained construction, to evade the effect of those statutes. By requiring those who complain of injuries to seek redress, by action at law, within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation.

The judgment in this case must be affirmed.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Ohio, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed with costs.

JAMES JACKSON, ON THE DEMISE OF HARMAN V. HART, PLAINTIFF
IN ERROR vs. ELIAS LAMPHIRE, DEFENDANT IN ERROR.

This court has no authority, on a writ of error from a state court, to declare a state law void on account of its collision with a state constitution; it not being a case embraced in the judiciary act, which gives the power of a writ of error to the highest judicial tribunal of the state. [288]

The plaintiff in error claimed to recover the land in controversy, having derived his title under a patent granted by the state of New York to John Cornelius. He insisted that the patent created a contract between the state and the patentee, his heirs and assigns, that they should enjoy the land free from any legislative regulations to be made in violation of the constitution of the state, and that an act passed by the legislature of New York, subsequent to the patent, did violate that contract. Under that act commissioners were appointed to investigate the contending titles to all the lands held under such patents as that granted to John Cornelius, and by their proceedings, without the aid of a jury, the title of the defendants in error was established against, and defeating the title under a deed made by John Cornelius, the patentee, and which deed was executed under the patent.

This is not a case within the clause of the constitution of the United States, which prohibits a state from passing laws which shall impair the obligation of contracts. The only contract made by the state is a grant to John Cornelius, his heirs and assigns of the land. The patent contains no covenant to do or not to do any further act in relation to the land; and the court are not inclined to create a contract by implication. The act of the legislature of New York does not attempt to take the land from the patentee, the grant remains in full effect; and the proceedings of the commissioners under the law, operated upon titles derived under, and not adversely to the patent. [289]

It is within the undoubted powers of state legislatures, to pass recording acts by which the elder grantees shall be postponed to a younger, if the prior deed is not recorded within a limited time; and the power is the same whether the deed is dated before or after the recording act. Though the effect of such a deed is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law violating the obligation of contracts. So too is the power to pass limitation laws. Reasons of sound policy have led to the general adoption of laws of this description, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur, where the provisions of a law on these subjects may be so unreasonable as to amount to a denial of a right, and to call for the interposition of this court. [290]

THIS was a writ of error to the court for the trial of impeachments and correction of errors for the state of New York.

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An action of ejectment was commenced in the supreme court of New York, to May term 1825, for a tract of land, part of lot number thirty-six, in Dryden, Tompkins county, part of the military tract, and formerly part of Onondaga county. The cause was tried in June 1826, and a verdict and judgment were rendered for the defendant. On the trial of the cause, a bill of exceptions was tendered by the plaintiff, and a writ of error was prosecuted by him to the supreme court of errors of the state of New York, where the judgment of the court below was affirmed; and the plaintiff brought up the case to this court by writ of error. The title of the plaintiff, as stated in the bill of exceptions, was derived under letters patent, for the whole lot number thirty-six, issued to John Cornelius, and his heirs and assigns, under the great seal of the state of New York, dated the 17th of July 1790; and a conveyance in fee of the lot from the patentee to Henry Hart, dated the 17th of January 1784, duly proved and deposited for record, according to the provisions of a statute of the state, on the 25th of April 1795. Evidence was also given to prove that Henry Hart died some time in the summer of 1788, leaving the lessor of the plaintiff his heir at law, he being then a minor, aged about five years. That about the year 1791, he was taken to Canada by his paternal uncle, and afterwards entered into the employ of the North West Company, and continued in the same for upwards of sixteen years, and then returned to New York; and has since resided in Albany in that state.

The title of the defendant was derived from the same patent to John Cornelius, and under a deed executed by him, dated June 23, 1784, duly proved October 31, 1791, and deposited, according to the statute, April 3, 1795. By this deed, the premises in dispute were conveyed to Samuel Brown. On the 25th of January 1793, Brown conveyed to William J. Vredenburgh and John Patterson; on the 9th of June 1800, Vredenburgh, for himself and as attorney for Patterson, regularly constituted, conveyed to Gerret H. Van Wagoner; who on the 9th of June 1800, conveyed to William J. Vredenburgh; and by a deed duly executed by Vredenburgh, July 5, 1800, duly acknowledged and recorded,

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the premises were vested in Elias Lamphire, the defendant in error.

On the 24th of March 1797, the legislature of New York passed "an act to settle disputes concerning the titles to lands in the county of Onondaga."

The preamble of that law recites:

Whereas a convention of delegates from a number of towns in the county of Onondaga have, by their petition presented to the legislature, prayed that a law may be passed, authorising a speedy and equitable mode of settling disputes relative to the titles of land in that county: therefore, be it enacted, &c.

The first section appoints commissioners, with full power to hear, examine, award and determine, according to law and equity, all disputes and controversies respecting the titles, and all claims whatsoever to any lands in the county of Onondaga, and to examine any party or parties submitting to their examination and witnesses on oath, and to commit any witness refusing to be sworn or to answer any question or questions touching the premises, to the gaol of the county in which they may then sit, there to remain until he or she shall submit to be sworn, and to answer such question or questions: provided always, that no person shall be obliged to answer any question which may tend to charge himself or herself with any crime, nor shall any witness be compelled to answer any question or questions wherein he or she shall be interested.

The second section directs that the commissioners shall proceed to execute their trusts, and shall meet for the purpose at times most convenient, in the county of Onondaga, and shall cause their award or determination upon every claim or controversy respecting any lands in the said county of Onondaga, to be entered in a book or books to be by them provided for that purpose; which award or determination shall, after the expiration of two years after the making thereof, become binding and conclusive to all persons, except such as, conceiving themselves aggrieved by any such award or determination, shall within the said two years dissent from the same, and give notice thereof to the said commissioners,

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or file the same in the office of the clerk of the county of Onondaga; and shall also, if not in the actual possession of such land, within three years after such award or determination commence a suit or suits, either at law or in equity, to recover the land or to establish his or her right to the same, and shall prosecute such suit or suits to effect; in which case, such award or determination shall not operate as a bar to such suit or suits, but if no such suit or suits are brought within the times aforesaid and prosecuted to effect, then the said award or determination of the commissioners shall be final and conclusive; and in case any such suit commenced within the time aforesaid shall abate by the death of the defendant, then the party dissenting, or if by his death, then his heirs or devisees, may at any time within one year revive such suit, or if necessary commence a new suit for the purpose aforesaid, and prosecute the same with like effect as such first suit might have been prosecuted, if it had not abated as aforesaid; and the said commissioners are hereby directed to enter in the said book or books a note of the time of receiving every such dissent; and when they shall have executed the trusts and duties by this act committed to them, they shall deposit the said book or books in the office of the clerk of the said county of Onondaga, there to remain as records of their proceedings: provided always, that if the parties in any case will enter into an agreement before the said commissioners, to abide by their determination, then and in every such case the award or determination of the said commissioners shall be final and conclusive as to such parties and their heirs for ever.

The third section directs notice of their appointment and of the time and place of their meeting to be given by the commissioners, and that the notice shall require all persons having any dispute or controversy respecting any title or claim to any land in the said county of Onondaga, to appear in person, or by their agents or attorneys, before the said commissioners, at the time and place therein mentioned, to exhibit their claims, that the said commissioners may proceed in the execution of the trusts committed to them.

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By the sixth section it is declared, that as to all lands in the county to which no adverse claim shall be made, an entry to that effect shall be made in the books of the commissioners, but in cases of interfering claims they shall examine and determine the same ; and in all cases where there are filed or recorded in the said office two or more deeds from one and the same person, or in the same right to different persons, if any person interested under either of them shall neglect to make his claim, and in all cases where several persons appear to have claims to one and the same piece of land, and any of them do not appear before the said commissioners, they shall cause a notice to be published in the newspapers aforesaid, and continued for six weeks, requiring all persons interested in such land to appear at a certain time and place therein mentioned, not less than six months from the date of such notice, and exhibit their claims to the same land ; and after the expiration of the time therein mentioned, it shall be lawful for the said commissioners to proceed to the examination and determination of all matters concerning the said land, and the title to the same, whether all or any of the parties interested therein appear and exhibit their claims or not ; saving to all persons aggrieved by any such award or determination the right of dissenting and prosecuting in the manner aforesaid.

The seventh provides, that if the party dissenting from the award of the commissioners shall be in the actual possession of the premises, then the award of the commissioners shall be as to such person of no effect ; and unless the party in whose favour the award of the commissioners shall be made, shall within three years commence a suit to establish his title to the land, and shall prosecute the same to effect, then he shall be for ever barred of all right or claim to the land.

The eighth section declares, that neither the act nor any thing therein contained shall be construed to the prejudice of any person under the age of twenty-one years, or feme covert, or person not of sound mind, or in prison ; if such infant, feme covert, person not sound of mind, or prisoner, shall within three years after coming to the age of twenty-

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one years, becoming discovert, of sound mind, and at liberty, make their dissent, and bring their suit and prosecute the same to effect.

The twelfth section prohibits the exercise of any powers under the act after the 1st day of June 1800.

On the 17th of December 1799, two of the commissioners made an award in the following terms.

"Having heard the proofs and allegations, and examined the title of such of the parties interested in lot number thirty-six, in the township of Dryden, in the county of Cayuga, as have appeared and exhibited claims to the said lot, and having also inspected the records and files remaining in the office of the clerk of the county aforesaid, relative thereto, and due deliberation being had thereon, we, the commissioners, appointed by and in pursuance of the act entitled "an act to settle disputes concerning titles of lands in the county of Onondaga," do, in pursuance of the authority given us in and by the said act, award and determine, that William J. Vredenburgh and John Patterson are entitled to, and stand seised in their demesne of an absolute estate of inheritance; in and to the same lot, subject to the reservations, provisions, and conditions contained in the original grant."

Mr Storrs, for the plaintiff in error, contended: that the judgment of the supreme court of error for the state of New York was erroneous, and should be reversed, for these reasons.

1. The letters patent, granting the lot to John Cornelius, created a contract with the grantee, his heirs and assigns, that they should enjoy the same free from any legislative regulations, to be made in violation of the constitution of the state.

2. The act of the legislature of the state of New York violated the constitution of the state and the United States; and the determination or award of the commissioners under it was a nullity.

3. It violated that provision of the constitution of the state which ordains, that "the legislature of this state shall, at no

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time hereafter, institute any new court or courts, but such as shall proceed according to the course of the common law."

4. It violated that article of the state constitution which ordained, that "trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established, and remain inviolate for ever."

5. It was, therefore, as well for these violations of the state constitution as on general principles, a statute which impaired the obligation of contracts.

6. The Onondaga commission was a court, within the meaning of the constitution of the state, which did not proceed according to the course of the common law.

7. It was without precedent; and was an arbitrary, ex parte, and summary tribunal, proceeding in violation of all the securities of property, which the citizens of that state had confided by their constitution to the protection of their common law courts.

Mr Hoffman, for the defendant in error, made the following points:

1. On a writ of error, to the court of last resort, in a state; under the circumstances of this case; the only error which can be alleged or regarded is, that the act of the legislature, in pursuance of which the award was made, is repugnant to the constitution of the United States.

2. The act of the legislature of New York, entitled "an act to settle disputes concerning the title to lands in the county of Onondaga," passed the 24th of March 1797, is not repugnant to the constitution of the United States, nor is the award under it.

3. The plaintiff in error contends that, the patent of the state of New York implies a contract on the part of the state with the grantee, his heirs and assigns, for ever; *that the legislature of the state should not pass any law affecting the estate, contrary to the state constitution*: that the law constituted a court which did not proceed by jury, according to the course of the common law, and thus the act impairs the obligation of an implied contract, and violates the constitution of the United States:

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For the defendant it is denied, that any such contract can be inferred or implied from the grant, nor any other than such as could have been fairly implied from it, if it had been made by the late colony of New York, or by any citizen of the state, or of lands lying without the state; and the law will not imply a covenant not to do an act which the state constitution had made impossible.

The act of March 24, 1797 is not contrary to the constitution of the state; but has been uniformly declared by the courts of the state, and lately by its highest court of judicature, to be constitutional; and their decision is final on this question.

5. The Onondaga commissioners were not a court; and could not make any judicial sentence respecting these lands: by the proviso to the third section of the act, where the parties would agree before them to abide by their determination, this award is declared to be final: in all other cases they acted as commissioners to ascertain and report the state of the title to these lands.

6. Their award, as such, had no effect or force to divest or impair the estate: and if a party is concluded by it, it is because he has consented and agreed thereto, by his neglect to file his dissent, and bring his suit within the period prescribed by law.

The act is a beneficial statute of limitations, which did not begin to run until after the award was made, and does not impair the obligations of any contract.

Mr Justice BALDWIN delivered the opinion of the Court.

Both parties claim the premises in question, under John Cornelius, to whom the state of New York granted them by patent, dated the 7th of July, 1790, in consideration of his military services in the revolutionary war.

Six years before the date of the patent, and while the title of Cornelius was imperfect, he conveyed the premises to Henry Hart, the father of the plaintiff's lessor, by deed dated January the 17th, 1784, proved and deposited in the office of the clerk of the county of Albany, according to law, on the 25th of April 1795.

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Henry Hart died in 1788, leaving the plaintiff, his only child, and heir at law, who was born the 21st of September 1784, removed to Canada in 1791, and remained there till 1807 or 1808, when he returned to Albany, where he resided till the commencement of this suit of May term 1826: he claims as heir at law to his father.

On the 23d of June 1784, John Cornelius conveyed the same premises to Samuel Broom by deed, duly proved and deposited as aforesaid on the 3d of April 1795. The title of Broom, by sundry mesne conveyances, became vested in William J. Vredenburgh, who conveyed to the defendant. The premises were vacant till 1808, when possession was taken under Vredenburgh, who then held the title of Broom.

The defendant did not question the original validity of the deed to Henry Hart, but rested his defence on an act of assembly of the state of New York, passed the 24th of March 1797, to settle disputes concerning titles to lands in the county of Onondaga, the provisions of which are set forth in the case.

The defendant offered in evidence an award made by two of the commissioners appointed by this act, awarding the land in controversy to William J. Vredenburgh and John Patterson (to whom Broom had conveyed); the award was dated December 17th, 1799, and no dissent was entered by the plaintiff. The court admitted the award to be read in evidence; and gave in charge to the jury, that it was competent and conclusive to defeat the title of the plaintiff. Judgment was rendered for the defendant in the supreme court, and affirmed in the court of errors; and the case comes before us by writ of error, under the twenty-fifth section of the judiciary act.

The plaintiff contends, that the act of the 24th of March 1797, and all proceedings under it, are void; being a violation both of that part of the constitution of the United States which declares, that no state shall pass any law impairing the obligation of contracts, and of the constitution of the state of New York, which declares that the legislature shall at no time institute any new court but such as shall proceed according to the course of the common law; and that trial by

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jury in all cases in which it hath heretofore been used, shall be established, and remain inviolate for ever.

This court has no authority, on a writ of error from a state court, to declare a state law void on account of its collision with a state constitution; it not being a case embraced in the judiciary act, which alone gives power to issue a writ of error in this case; and will therefore refrain from expressing any opinion on the points made by the plaintiff's counsel, in relation to the constitution of New York.

The plaintiff insists, that the patent to John Cornelius creates a contract with the grantee, his heirs and assigns, that they should enjoy the land therein granted, free from any legislative regulations to be made in violation of the constitution of the state; that the act in question does violate some of its provisions; and therefore impairs the obligation of a contract.

The court are not inclined to adopt this reasoning, or to consider this as a case coming fairly within the clause of the constitution of the United States relied on by the plaintiff. The only contract made by the state is a grant to John Cornelius, his heirs and assigns, of the land in question: the patent contains no covenant to do or not to do any further act in relation to the land; and we do not, in this case, feel at liberty to create one by implication. The state has not by this act impaired the force of the grant; it does not profess or attempt to take the land from the assigns of Cornelius, and give it to one not claiming under him; neither does the award produce that effect: the grant remains in full force, the property conveyed is held by his grantee, and the state asserts no claims to it. The question between the parties is, which of the deeds from Cornelius carries the title. Presuming that the laws of New York authorized a soldier to convey his bounty land before receiving a patent, and that at the date of the deeds there was no law compelling the grantees to record them, they would take priority from their date. This is the legal result of the deeds, but there is no contract on the part of the state, that the priority of title shall depend solely on the principles of the common law, or that the state shall pass no law imposing on a grantee the

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performance of acts which were not necessary to the legal operation of his deed at the time it was delivered. It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such too is the power to pass acts of limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right, and call for the interposition of the court; but the present is not one.

The state of New York, in 1794, had felt the necessity of legislating on these military lands. The preamble to the recording act of January 1794, shows very strongly the policy of compelling the deeds for these lands to be recorded; and the known condition of that part of the state, covered by military grants, presented equally cogent reasons, in our opinion, for the passage of the act in question.

As this court is confined to the consideration of only one question growing out of this law, we do not think it necessary to examine its provisions in detail: it is sufficient to say, that we can see nothing in them inconsistent with the constitution of the United States, or the principles of sound legislation. Whether it is considered as an act of limitations, or one in the nature of a recording act, or as a law *sui generis*, called for by the peculiar situation of that part of the state on which it operates; we are unanimously of opinion, that it is not a law which impairs the obligation

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of a contract; and that in receiving the award in evidence, and declaring it to be competent and conclusive on the right of the plaintiff, there was no error in the judgment of the court below. The judgment is therefore affirmed.

This cause came on to be heard on the transcript of the record from the court for the trial of impeachments and correction of errors for the state of New York, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said court for the trial of impeachments and correction of errors for the state of New York in this cause, be, and the same is hereby affirmed with costs.

SAMUEL D. HARRIS, PLAINTIFF IN ERROR vs. JAMES DENNIE.

Twenty-three cases of silk were imported from Canton in the ship Rob Roy into the port of Boston, consigned to George D'Wolf and John Smith. After the arrival of the vessel with the merchandize on board, the collector caused an inspector of the customs to be placed on board. Soon afterwards, and prior to the entry of the merchandize, and prior to the payment or any security for the payment of the duties thereon, the merchandize was attached by the deputy sheriff of the county, in due form of law, as the property of G. D'Wolf and J. Smith, by virtue of several writs of attachment issued from the court of common pleas for the county of Suffolk, at the suit of creditors of G. D'Wolf and Smith. These attachments were so made prior to the inspector's being sent on board the vessel. At the time of the attachment, the sheriff offered to give security for the payment of the duties on the merchandize, which the collector declined accepting. The merchandize was sent to the custom-house stores by the inspector, and several days after, the custom house store keeper gave to the deputy sheriff an agreement signed by him, reciting the receipt of the merchandize from the inspector; and stating, "I hold the said merchandize to the order of James Dennie, deputy sheriff." The marshal of the United States afterwards attached, took, and sold the merchandize under writs and process, in favour of the United States, against George D'Wolf; which writs were founded on duty bonds, due and unpaid, for a larger amount than the value of the merchandize, given before by D'Wolf and Smith; who, before the importation of the merchandize, were indebted to the United States on various bonds for duties, besides those on which the suits were instituted. Held, that the attachments issued out of the court of common pleas of the county of Suffolk, did not affect the rights of the United States to hold the merchandize until the payment of the duties upon them; and that the merchandize was not liable to any attachment by an officer of the state of Massachusetts, for debts due to other creditors of George D'Wolf and John Smith. It has often been decided in this court, that it is not necessary that it shall appear, in terms, upon the record, that the question was presented in the state court, whether the case was within the purview of the twenty-fifth section of the judicial act of 1789, to give jurisdiction to this court in a case removed from a state court. It is sufficient, if, from the facts stated, such a question must have arisen, and the judgment of the state courts would not have been what it is, if there had not been a misconstruction of some act of congress, &c. &c. or a decision against the validity of the right, title, privilege or exemption set up under it. [801]

The United States have no general lien on merchandize, the property of the importer, for duties due by him upon other importations. The only effect of the first provision in the sixty-second section of the act of 1799, ch. 128, is that the delinquent debtor is denied at the custom house any *further credit for duties* until his unsatisfied bonds are paid. He is compellable to pay the duties in cash, and upon such payment he is entitled to the delivery of the goods im-

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ported. The manifest intention of the remaining clauses in the section, is to compel the original consignee to enter the goods imported by him. [302].

No person but the owner or original consignee, or in his absence or sickness, his agent or factor, is entitled to enter the goods at the custom house, or give bond for the duties, or to pay the duties (sect. 56 and 62). Upon the entry the original invoices are to be produced and sworn to; and the whole objects of the act would be defeated by allowing a mere stranger to make the entry, or take the oath prescribed on the entry. [304]

The United States having a lien on goods imported for the payment of the duties accruing on them, and which have not been secured by bond; and being entitled to the custody of them from the time of their arrival in port until the duties are paid or secured; any attachment by a state officer is an interference with such lien and right to custody; and, being repugnant to the laws of the United States, is void. [305]

The acknowledgement by the custom house store keeper, that he holds goods, upon which the duties have not been secured or paid, subject to an attachment issued out of a state court at the suit of a creditor of the importer, was a plain departure from his duty, and is not authorized by the law of the United States, and cannot be admitted to vary the rights of the parties. [306]

WRIT of error to the supreme judicial court of Massachusetts, for the counties of Suffolk and Nantucket.

In the court of common pleas of the county of Suffolk, Massachusetts, James Dennie, the defendant in error, a deputy sheriff of that county, under a precept issued by the authority of the state, attached twenty-three cases of silks imported in the brig Rob Roy, from Canton, for a debt due by the importers and owners of the goods, George D'Wolf and James Smith. Soon after the arrival of the vessel, the collector of the port caused an inspector of the customs to be placed on board. The attachment was made before the entry of the merchandise, and payment made or security given for the payment of the duties thereon, and before an inspector was put on board the vessel. At the time of the attachment, the plaintiff offered to give the collector security for the payment of the duties to the United States, which he declined to accept. About seventeen days after the attachment, the merchandise being in the custom house stores, under the following agreement, to wit, "District of Boston and Charleston, port of Boston, August 29th 1826. I certify that there has been received into store, from on board the brig Rob Roy, whereof — — is master, from Canton, the following merchandise, to wit, twenty three cases silks, A. O. 1 to 23, lodged by D. Rhodes, Jun. inspector, under whose care the

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vessel was unladen. B. H. Scott, public store-keeper. I hold the above described twenty-three cases silks subject to the order of James Dennie, Esq. deputy sheriff. B. H. Scott; the defendant, being the marshal of the United States for the district of Massachusetts, attached and took the same merchandize, by virtue of several writs in favour of the United States against D'Wolf, duly issued from the district court of the United States. These writs were founded upon bonds for duties given by D'Wolf and Smith, amounting to a sum much larger than the value of the merchandize, which duties were due and unpaid when the merchandize arrived.

The deputy sheriff, James Dennie, brought an action of trover against the marshal for the goods; and the judgment of the supreme judicial court of the state, to which the case was removed by writ of error from the inferior court, was in favour of the original plaintiff; and the defendant prosecuted this writ of error.

The following errors were assigned in the supreme judicial court of Massachusetts: that, according to the true construction of the several acts of the congress of the United States, imposing duties on certain goods, wares and merchandize imported into the United States from foreign ports, and also of the act of said congress made and passed on the 2d day of March 1799, entitled "an act to regulate the collection of duties on imports and tonnage :" it is contended,

1. That upon the arrival of the said merchandize in question at the port of Boston and Charleston, and prior to the supposed attachment thereof by the said Dennie, a debt immediately accrued to the United States for the amount of the duties thereon; and the collector for said port had therefore a legal lien on the said merchandize for the debt aforesaid; and consequently they were not then subject to the said Dennie's attachment aforesaid.

2. That the offer of the said Dennie, at the time of making his said attachment, to give to the said collector security for the payment of the duties on said merchandize, did not in point of law give validity to the said attachment; inasmuch as the said collector was not at that time, it being prior to any entry of the merchandize at the custom house, au-

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thorised by law to receive security from the said Dennis, or any other person or persons whomsoever, for payment of the duties aforesaid.

3. That after the said merchandize was placed in the custom house store, as is found by the special verdict, and from that period to the time when they are stated to have been attached in behalf of the United States by the said Harris, as marshal of said district, the legal lien of the United States constantly remained with them; and that the certificate of B. H. Scott, the store-keeper, which appears in the said verdict, can have had no effect to discharge or in any degree to impair the force of the said lien.

4. That by the provisions contained in the sixty-second section of the aforesaid act of March 2, 1799, the goods in question, the same having been imported by and consigned to George D'Wolf and John Smith, as by said verdict is found, are in point of law to be considered as their property, so far as to be holden liable for the payment of all the debts then due from them to the United States for duties on merchandize heretofore imported by them into the said port of Boston and Charleston.

It was also in this court contended, that the defendant in error had no property, either absolute or special, nor possession, nor the right of possession in the goods, which were the object of the supposed trover and conversion in the declaration mentioned.

The case was argued by Mr Berrien, attorney general, and Mr Dunlap, district attorney of the United States for the district of Massachusetts, for the plaintiff in error; and by Mr Webster, for the defendant.

For the plaintiff in error, Mr Dunlap stated, that the position contended for in the state court was, that under the revenue law the government of the United States has a lien on goods imported, not only for the duties accruing on that importation, but also for the payment of all debts due from the consignees arising from antecedent importations. This question, he admitted, had since been disposed of against the United States. *Conrad vs. The Atlantic Ins. Com.* 1 Peters,

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386. It is supposed that the great question in the cause now before the court is, whether goods imported can, before entry at the custom house, and while under the lien of the government, in possession of the custom house officers, be legally attached by virtue of process from a state court. Such an attachment, it is claimed, is not only void by the laws of the United States, but also by the laws of the state of Massachusetts; and therefore the defendant in error did not by the process obtain any property or right of possession in the goods, which could enable him to maintain an action of trover.

The laws of the United States provide, that goods imported shall, until entered at the custom house, be taken into the possession of the officers of the government, and after a certain time be deposited in the custom house stores; and afterwards, a further time having expired, if they have not been entered by or for the importer, they are to be sold according to the thirty-sixth and fifty-sixth sections of the act of March 3, 1799.

An attachment, at the suit of any creditor of the importer, upon goods thus situated, would interfere with and destroy the possession and lien of the government, thus secured by law. Such an attachment, thus interfering with rights thus given, is the exercise of "an authority under a state," which "is repugnant to the laws of the United States." The exercise of such an authority is in opposition to the exemption claimed to exist in favour of those goods from such process, and is a defence for the marshal of the United States to this action of trover by the deputy sheriff. This case is therefore one properly within the action of the ninety-fifth section of the judiciary law; and is well brought before this court to reverse the judgment of the supreme judicial court of Massachusetts.

The attachment from the state court is void, as well by the laws and adjudged cases of Massachusetts, as by the laws of the United States. A statute of the state, if it interfered with a law of the general government in reference to subjects within its legitimate operation, would be void; but no such law, in reference to the proceedings and claims of the defendant in error, is to be found. To constitute a legal

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attachment of goods, they must be taken within the actual or constructive possession of the officer; and when this cannot be done, on account of the existence of prior liens, or from any other cause, no attachment can be valid. The decisions in the state of Massachusetts fully sustain this position. *Phillips vs. Badger*, 11 Mass. 247. *Bedlam vs. Tucker et al.* 1 Pick. 389. *Watson vs. Todd et al.* 5 Mass. Rep. 271.

In *Pierce vs. Jackson*, 6 Mass. Rep. 242, the court say that when goods are attached, they must be seized under execution within thirty days, or the lien of the judgment is gone. The goods in the custom house stores could not have been sold under any process. Cited, *Vinton vs. Bradford*, 15 Mass. 114. *Lane vs. Jackson*, 5 Mass. 157, decides that the officer must have the actual possession and custody of the goods. Cited also, *Odiorne vs. Polley*, 2 New Hamp. Rep. 66. Also, 2 New Hamp. Rep. 317. *Holbrook vs. Blake*, 5 Greenleaf's Rep. 371. 6 Conn. Rep. 356. 1 Shower, 169. *Vin. Ab. Distress*, E. 2. H. 42. H. 52.

The effect of the acknowledgement of the store keeper could not be to vest a property in the goods in the deputy sheriff. It was unauthorized; and the store keeper had nothing to dispose of. He was the agent of the United States, to protect and preserve the property while in the public stores; and he could not divest himself of these relations, and become the bailee of the sheriff.

If the sheriff had no right to make the attachment, he acquired by it either a general or a special property, which is necessary in order to maintain trover; and in fact he never had the actual possession of the goods. The only title he asserts is, as an officer by virtue of the attachment; and if that is adjudged illegal and void, the foundation of his action fails. 2 Saunders's Rep. 47. 7 T. R. 9.

Mr Webster for the defendant contended; that this court has no jurisdiction of the case, according to the provisions of the judiciary law.

It is not required that it should appear, in form, that an act of congress has been misconstrued; if it has been sub-

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stantially the fact, it is sufficient to give the writ of error to the highest state tribunal. But it does not appear in any part of this record, that such was the proceeding in the supreme judicial court of Massachusetts.

The question originally raised in this case was, whether the United States had a general lien on goods imported for debts due to them by the importer; and that question has, since this action was brought, been decided in the negative in *Conrad vs. the Atlantic Insurance Company*. The only question remaining in this case was, whether the goods were liable to attachment, and this was a question properly for the decision of the state courts. The United States claimed to attach and hold the goods for the debts due to them by D'Wolf and Smith, and the other creditors of those persons denied this claim, and proceeded by an attachment. The United States stood in no other relations and with no other rights before the state court than the other creditors. In the state court, and upon the state decisions, the attachment for the creditors was considered valid. This is an answer to the argument, that such is not the law of Massachusetts. This decision does not therefore bring into question the construction of any act of congress.

Mr Berrien, attorney general, in reply, argued: that there was enough in the record to show that a question of the application of a statute of the United States was decided by the supreme judicial court of Massachusetts; and this would sustain the jurisdiction, although it may not have been the only question in the case. 2 Wheat. 363. 1 Wheat. 304.

This is an action of trover against an officer of the United States, the marshal, for taking goods out of the hands of an alleged bailee, for a debt due to the United States; and the question is, was there then an existing lien in favour of the United States under the sixty-second section of the duty act?

The construction of this statute was thus brought into question, by the inquiry whether there was a conversion by the marshal. He says, that his proceedings were under the authority of the law; and it was therefore essential that the state court should decide upon the law, and construe the law.

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2. In an action of trover and conversion, the plaintiff must show property, and a right to retain it.

The goods were in the possession of the custom house, and subject to duties which were unpaid. It was necessary that the court should decide, that goods, before the payment of the duties, can be taken out of the possession of the custom house by the process of state courts. This question is to be decided by a reference to the laws of the United States.

Such an exercise of power would be inconsistent with the provisions of the laws of the United States.

The position which is asserted by the plaintiff in error, is that goods so situated are exempt from such process.

The plaintiff in the state court contended; that they could be taken under the authority of the state of Massachusetts; and this was the assertion of a claim of authority under a state, against the laws of the United States.

Upon these grounds it is manifest that the construction of the laws of the United States immediately entered into the question before the state court. It must appear to this court, 1. That the goods were liable to be attached. 2. That there is nothing in the laws of the United States which prevents this. 3. That the United States had no lien on the goods. All these points must be decided in favour of the plaintiff below, before it can be held that the marshal was guilty of a conversion.

Mr Justice STORY delivered the opinion of the court:

This is a writ of error to the judgment of the supreme judicial court of the state of Massachusetts.

The original action was trover, brought by the defendant in error against the plaintiff in error, for twenty-three cases of silk, which had been attached by Dennis, as deputy sheriff of the county of Suffolk, and afterwards attached by Harris, as marshal of the district of Massachusetts. The cause was tried upon the general issue, and a special verdict found, upon which the state court rendered judgment in favour of the original plaintiff.

The special verdict was as follows. The jury find that

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the merchandize described in the declaration was brought in a vessel of the United States into the port of Boston, in the collection district of Boston and Charleston in Massachusetts, from a foreign port, prior to the commencement of this action. That the said merchandize came consigned to George D'Wolf and John Smith, as was evidenced by the manifest of the cargo of the said vessel at the time of the importation. That soon after the arrival of the said vessel with the merchandize on board, as aforesaid, the collector of the said port caused an inspector of the custom house to be placed on board thereof, in conformity with the requirements of law in such cases. That soon after the arrival of the said vessel, and prior to the entry of the said merchandize with the collector, and prior to the payment or any security for the payment of the duties thereupon, the same were attached in due form of law as the property of the said George D'Wolf and John Smith, by virtue of several writs of attachment issued from the court of common pleas for the said county of Suffolk, in favour of Andrew Blanchard and others; the said attachment having been made by the plaintiff in his capacity of a deputy of the sheriff of the aforesaid county of Suffolk, prior to the inspector's being put on board, as aforesaid. That at the time of the said attachment, the said sheriff offered to give to said collector security for the payment of the duties upon the said merchandize, which the said collector declined to accept. That about seventeen days subsequently to the time of the attachment, the said merchandize being in the custom house stores, under the following agreement, viz: "District of Boston and Charleston, port of Boston, August 29th 1826. I certify that there has been received in store, from on board the brig Rob Roy, whereof _____ is master, from Canton, the following merchandize, viz: twenty-three cases of silk, A. O. 1 to 23, lodged by D. Rhodes, Jun. inspector, and under whose care the vessel was unladen. (Signed) B. H. Scott, public store-keeper. I hold the above twenty-three cases of silks subject to order of James Dennie, deputy sheriff. (Signed) B. H. Scott." The defendant (Harris) being marshal, &c. attached the said merchandize, and took the same, by virtue of several writs to

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him directed, in favour of the United States, against the s D'Wolf; which writs were duly issued from the district court of the United States for the district of Massachusetts; which writs were founded on bonds for duties theretofore given by the said D'Wolf and Smith, and which bonds were then due and unpaid, being for a large sum of money. That the said D'Wolf and Smith, at the time of the said importation of the merchandize aforesaid, were jointly and severally indebted to the United States on various other bonds for duties, besides those on which the writs aforesaid were instituted, which said first mentioned bonds were also then due and unsatisfied; and that the bonds for duties above referred to, and upon which the attachment by the said marshal was made, amounted to a much larger sum than the value of the merchandize thus attached. But whether or not, &c. &c. in the common form of special verdicts.

As this case comes from a state court, under the twenty-fifth section of the judiciary act of 1789, ch. 20, it is necessary to consider, whether this court can entertain any jurisdiction thereof, consistently with the terms of that enactment. That section, among other things, enacts that a final judgment of the highest state court may be revised, where it is drawn in question the validity of a statute of, or an authority exercised under, any state on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of their validity; or where it is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up, or claimed by either party, under such clause of the said constitution, treaty, statute or commission.

The objection is, that this court has not jurisdiction of this case, because it does not appear upon the record that any question within the purview of the twenty-fifth section arose in the state court upon the decision on the special verdict. But it has been often decided in this court, that it is not necessary that it should appear, in terms, upon the record, that any such question was made. It is sufficient, if from the

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facts stated such a question must have arisen, and the judgment of the state court would not have been what it is, if there had not been a misconstruction of some act of congress, &c. &c. or a decision against the validity of the right, title, privilege or exemption set up under it. 4 Wheat. 311. 12 Wheat. 117. 2 Peters's Rep. 245, 380, 409.

In the present case it is contended, that the United States, by virtue of the sixty-second section of the Revenue Collection Act of 1799, ch. 128, had a lien on the present merchandize for all debts antecedently due on custom house bonds by D'Wolf and Smith, and that consequently the attachment of the marshal overreached that of the private creditors, and that the state court have decided against such lien. If there be no such lien, still it is contended, that under the provisions of the Revenue Collection Act of 1799, ch. 128, the merchandize was not liable to attachment at the suit of any private creditors under the circumstances; and that the state court in giving judgment for the plaintiff, must have overruled that defence, and misconstrued the act.

The question as to the lien of the United States for duties antecedently due, was certainly presented by the special verdict. But we are all of opinion, that the decision of the state court, disallowing such a lien, was certainly correct.

The sixty-second section of the act of 1799, ch. 128, after providing for the manner of paying duties, and of giving bonds for duties, and the terms of credit to be allowed therefor, goes on to provide, "that no person whose bond has been received, either as principal or surety, for the payment of duties, or for whom any bond has been given by an agent, factor or other person in pursuance of the provisions herein contained, and which bond may be due and unsatisfied, shall be allowed a *future credit for duties*, until such bond be fully paid or discharged." The only effect of this provision is, that the delinquent debtor is denied at the custom house any *future credit for duties*, until his unsatisfied bonds are paid. He is compellable to pay the duties in cash; and upon such payment he is entitled to the delivery of the goods imported. There is not the slightest suggestion in the clause; that the United States shall have any lien on such

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goods for any duties due on any other goods, for which the importer has given bonds, and for which he is a delinquent. It was at once perceived by congress, that the salutary effect of this provision, denying credit upon duties, would be defeated by artifices and evasions, and the substitution of new owners or consignees after the arrival of the goods in port, and before the entry thereof at the custom house. To repress such contrivances, the next succeeding clause of the act provides, "that to prevent frauds arising from collusive transfers, it is hereby declared that all goods, &c. imported into the United States, shall, *for the purposes of this act*, be deemed and held to be the property of the persons to whom the said goods, &c. may be consigned, any sale, transfer or assignment prior to the entry and payment, or securing the payment, of the duties on the said goods, &c. and the payment of all bonds then due and unsatisfied by the said consignee, to the contrary notwithstanding." The manifest intent of this clause was to compel the original consignee to enter the goods; and if he was a delinquent, to compel him to pay his prior bonds, or to relinquish all credit for the duties accruing upon the goods so imported and consigned to him. It does not purport to create any lien upon such goods for any duties due upon other goods; but merely ascertains who shall be deemed the owner, for the purpose of entering the goods and securing the duties. The state court, therefore, did not, so far as this question is concerned, misconstrue the act of congress, or deny any right of the United States existing under it.

The other point is one of far more importance; and, in our opinion, deserves a serious consideration. If, consistently with the laws of the United States, goods in the predicament of the present were not liable to any attachment by a state officer, it is very clear that the present suit could not be sustained, and that judgment ought to have been given upon the special verdict in favour of the original defendant. And in our opinion these goods were not liable to such an attachment. In examining the Revenue Collection Act of 1799, ch. 128, it will be found, that numerous provisions have been solicitously introduced, in order to prevent

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any univery, or removal of any goods imported from any foreign port in any vessel arriving in the United States, until after a permit shall have been obtained from the proper officer of the customs for that purpose. These provisions not only apply to vessels which have already arrived in port, but to those which are within four leagues of the coast of the United States. The sections of the act, from the twenty-seventh to the fifty-eighth, are in a great measure addressed to this subject. From the moment of their arrival in port, the goods are, in legal contemplation, in the custody of the United States; and every proceeding which interferes with, or obstructs or controls that custody, is a virtual violation of the provisions of the act. Now, an attachment of such goods by a state officer, presupposes a right to take the possession and custody of those goods, and to make such possession and custody exclusive. If the officer attaches upon mesne process, he has a right to hold the possession to answer the exigency of that process. If he attaches upon an execution, he is bound to sell or may sell the goods within a limited period, and thus virtually displace the custody of the United States. The act of congress recognizes no such authority, and admits of no such exercise of right.

No person but the owner or consignee, or, in his absence or sickness, his agent or factor in his name, is entitled to enter the goods at the custom house, or give bond for the duties or pay the duties. (Sect. 36, 62.) Upon the entry the original invoices are to be produced and sworn to; and the whole objects of the act would be defeated by allowing a mere stranger to make the entry, or take the oath prescribed on the entry. The sheriff is in no just or legal sense the owner or consignee; (and he must, to have the benefit of the act, be the *original* consignee;) or the agent or factor of the owner or consignee. He is a mere stranger, acting *in invitum*. He cannot then enter the goods, or claim a right to pay the duties, or procure a permit to unlade them; for such permit is allowed in favour only of the party making the entry, and paying or giving bond for the duties. (Sect. 49, 50.) If within the number of days allowed by law for unlading the cargo the duties are not paid or secured, the

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goods are required to be placed in the government stores, under the custody and possession of the government officers. And at the expiration of nine months, the goods so stored are to be sold, if the duties thereon have not been previously paid or secured. (Sect. 56.)

It is plain that these proceedings are at war with the notion that any state officer can, in the interval, have any possession or right to control the disposition of these goods; and the United States have no where recognized or provided for a concurrent possession or custody by any such officer. In short, the United States having a lien on the goods for the payment of the duties accruing thereon, and being entitled to a virtual custody of them from the time of their arrival in port until the duties are paid or secured, any attachment by a state officer is an interference with such lien and right of custody; and being repugnant to the laws of the United States, is void.

It has been suggested, that the certificate of the store keeper, declaring that he held the silks subject to the order of the attaching officer, might vary the application of this doctrine. But such an agreement was a plain departure from the duty of the store keeper; and was unauthorized by the laws of the United States. It cannot, then, be admitted to vary the rights of the parties. See fifty-sixth section of the act of 1799, ch. 128.

This view of the subject renders it wholly unnecessary to consider the point, so elaborately argued at the bar, whether by the laws of Massachusetts an attachment would lie in such a case. If it would, the present attachment would not be helped thereby; because it involves an interference with the regulations prescribed by congress on the subject of imported goods.

Upon the whole, it is the unanimous opinion of the court, that the judgment of the state court ought to be reversed; and that a mandate issue to that court, with directions to enter judgment upon the special verdict, in favour of the original defendant.

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This cause came on to be heard on the transcript of the record from the supreme judicial court of the commonwealth of Massachusetts, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the goods in the special verdict mentioned, were not by the laws of the United States, under the circumstances mentioned in the said verdict, liable to be attached by the said Dennis upon the process in the said verdict mentioned; but that the said attachment so made by him as aforesaid, was repugnant to the laws of the United States, and therefore utterly void. It is therefore considered and adjudged by this court, that the judgment of the said supreme judicial court of Massachusetts rendered upon the said verdict be, and the same is hereby reversed, and that a mandate issue to that court with directions to enter a judgment upon the said verdict in favour of the original defendant, Samuel D. Harris; and that such further proceedings be had in said cause as to law and justice may appertain.

RACHEL CANTER, ADMINISTRAATRIX OF DAVID CANTER, DECEASED,
CLAIMANT vs. THE AMERICAN INSURANCE COMPANY AND OCEAN
INSURANCE COMPANY OF NEW YORK, APPELLANTS.

The libellants, in their original libel in the district court of the United States for the district of South Carolina, prayed that certain bales of cotton might be decreed to them with *damages* and costs. Canter, who also claimed the cotton, prayed the court for restitution, with *damages* and costs. The district court decreed restitution of part of the cotton to the libellants, and dismissed the libel, without any award of *damages* on either side. Both parties appealed from this decree to the circuit court, where the decree of the district court was reversed, and restitution of all the cotton was decreed to Canter, with costs; *without any award of damages, or any express reservation of that question in the decree.* From this decree the libellants in the district court appealed to this court; no appeal was entered by Canter. Held, that the question of a claim of damages by Canter is not open before this court. The decree of restitution, without any allowance of damages, was a virtual denial of them, and a final decree upon Canter's claim of damages. It was his duty, at that time, to have filed a cross appeal, if he meant to rely on a claim to damages; and not having done so, it was a submission to the decree of restitution and costs only.

The counsel fees allowed as expenses attending the prosecution of an appeal to the circuit court and to the supreme court, in an admiralty case.

This is not a proper case for the award of damages. The proceedings of the libellants were in the ordinary course to vindicate a supposed legal title. There is no pretence to say that the suit was instituted without probable cause, or was conducted in a malicious or oppressive manner. The libellants had a right to submit their title to the decision of a judicial tribunal, in any legal mode which promised them an effectual and speedy redress. Where parties litigate in the admiralty, and there was a probable ground for the suit or defense, the court considers the only compensation which the successful party is entitled to, is a compensation in costs and expenses. If the party has suffered any loss beyond these, it is *damnum absque iuria.* [318]

It is of great importance to the due administration of justice, and in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon *final decrees only*, that causes should not come up here in fragments or successive appeals. It would occasion very great delays and oppressive expenses. [318]

The settled practice of this court is, that whenever damages are claimed by the libellant or the claimant in the original proceedings, if a decree of restitution and costs only passes, it is a virtual denial of damages; and the party will be deemed to have waived the claim for damages, unless he then interposes an appeal or cross appeal to sustain that claim. [319]

Costs and expenses are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court; and no appeal lies from a mere decree respecting costs and expenses. [319]

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THIS case was heard at January term 1828, upon questions submitted to the court, on an appeal from the circuit court of the district of South Carolina. 1 Peters, 511. The court then decided in favour of the claimant, and directed restitution of the cotton, which was the subject of the controversy between the parties ; having affirmed the decree of the circuit court of South Carolina. By the mandate to the circuit court it was ordered, " that such execution and proceedings be had, as according to right and justice, and according to the laws of the United States, ought to be had." Upon the filing of the mandate the circuit court ordered, "that the case be put on the docket, and it be referred to the officer of this court to examine into the damages sustained by the claimant, David Canter, in consequence of the proceedings of the libellants, and report thereon at as early a day as possible to this court.

The appellant, David Canter, thereupon filed in the circuit court " a statement of damages sustained by him, by the illegal seizure of three hundred and fifty-six bales of cotton, by order of the underwriters."

The statement set forth losses on the sales of the cotton, and expenses and payments connected with the same, amounting to \$3639 87. Losses and probable gain on sales of rice purchased by the appellants, and which was sold instead of being shipped, in consequence of the proceedings of the appellees ; the cost of protest and damages on a bill of exchange drawn by him, and dishonoured in consequence of the seizure of the cotton ; law expenses at Charleston and Columbia, in South Carolina, and in Washington, and travelling expenses to and in Washington ; papers from Key West, relative to judicial proceedings there ; postages and protests, costs of the supreme court of the United States, and briefs ; loss in the value of the cotton during the pendency of the proceedings, \$2860.

The counsel for the appellees filed with the register of the court a protest against the order of reference made by the circuit court, to ascertain the damages alleged to have been sustained by the appellant, on the grounds, 1. That the mandate of the supreme court of the United States gives no

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authority or instructions to the circuit court to inquire into damages. 2. That the decrees of the district, circuit, and supreme court, do not award damages to the appellant. 3 That the appellees were not in any manner liable for damages. 4. That at all events, the inquiry into damages cannot extend beyond the amount of the stipulations entered into by the appellees in the original proceedings, by which alone they are before the court.

The clerk of the circuit court refused all the claims preferred by the appellant, with the exception of the following:

Papers from Key West, to establish legality of proceedings there \$51, postages and pro- tests \$20, - - - - -	\$71, 00
Costs of the supreme court and briefs \$72 02, protest and damages on bill drawn by claim- ant \$222, - - - - -	294 02

This grew out of the cotton speculation, the
bill was dishonoured in consequence of the seiz-
ure, the claimant not being in funds to take up
the draft.

Counsel fees; at Charleston and Washington,	1150 00
	<hr/>
	\$1515 02

Also the loss on the sale of the cotton, which was made before the proceedings were instituted against the cotton, and which sale was not completed by reason of the same, with interest on the balance of the sale after deducting the actual proceeds of the cotton, when sold by order of the district court \$3991 77; and also the actual loss on the rice purchased, to be paid for out of the proceeds of the cotton, rejecting the claim of probable profits, the sum actually allowed being \$2820 67.

These allowances were all excepted to by the appellees, and the appellant also excepted to the refusal of the clerk of the circuit court to admit all of the claims preferred in "the statement."

The circuit court refused to allow to the appellant any of the items reported by the clerk, with the exception of some of those comprehended in the "incidental expenses." As to

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those items, the clerk rejected the sum of \$222 for protests and damages on a bill of exchange, and ordered the counsel fees of the appellant to be paid under the mandate, upon the authority of the Apollon, 9 Wheat. 362, as the costs awarded him by the supreme court \$1372 82.

The appellant appealed to this court.

At the last term Mr Cruger moved to dismiss the appeal, on the ground that the mandate from this court gave no authority to the circuit court of south Carolina to assess damages to the appellant. This motion was opposed by Mr Coxe, for the appellant ; and the court ordered the cause to be argued upon all the questions it involved, when it should be regularly called.

At this term, Mr Coxe for the appellant contended ; that the decree of the circuit court from which the former appeal was taken, left the question of damages open. That appeal was taken by the claimants in the circuit court, now the appellees, and it was from a decree, in its nature interlocutory, and not final ; and if this was not so, it was the act of those who are now appellees, and cannot prejudice the rights of the appellant.

In the case now before the court, the appeal has been taken by Canter only, and not by those who claimed the cotton. The only question therefore in this court is, whether sufficient damages have been awarded, as no cross appeal was entered, and there can be no inquiry whether damages may be assessed at all ; this having been decided in the circuit court. The appellee cannot here impugn the decree below upon this point.

Is this then a case for damages, or rather for full compensation ?

The entire record is now before this court ; the pleadings and the evidence which were under consideration during the last term, still constitute a part of the case upon which the decision must be based.

It will be recollectcd that the claimant became the proprietor of the cotton at Key West, where it was found in the possession of certain salvors. The libellants were present, by

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their agent, who was cognizant in the proceedings, acquiesced in them, and received the portion of the proceeds of sale to which they were entitled. The captain of the wrecked vessel was also present, and all participated in what was done there.

No proceedings were ever instituted by the libellants against the authors or abettors of the acts of which they complained. No attempt was ever made to arrest them in the progress of the business, to punish them afterwards, or to pursue the money in their hands. All was reserved for this innocent purchaser. Innocent he was, for this court has decreed the sale to be valid, and his title to be incontrovertible; innocent as regards them; for he did no one act in which they had not concurred.

They avowed their object to be to break up these proceedings at Key West; and this was to be effected by the ruin of this claimant.

This court has definitively settled the question of right between these parties; the libellants had no interest in the cotton, the subject matter of the suit. It was the property of the claimant.

In the prosecution of this suit against him, however, he has been deprived of this property; he has incurred heavy expenses and losses, and he asks not vindictive damages; he asks nothing *nomine penæ*; he merely asks to be placed in the situation he would have occupied had these proceedings never been instituted against him. He claims in fact nothing which may not properly be awarded under the name of restitution. This is emphatically the case in regard to the first item. The property has long since been disposed of; it probably has no longer an existence; restitution in specie must be had; the mandate of this court cannot be literally executed.

This has been rendered impracticable by the acts of libellants. They seized upon the article; they withdrew it from the control of the claimant. While thus retained by them, it is so disposed of, that the owner can never be restored to the actual enjoyment of it. What then are his rights, and what will satisfy the order of this court that the property shall be restored?

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He had entered into an actual contract to sell it for \$17,425; that amount of money was in fact and in substance the object of the suit. The claimant had no right to the cotton which he had sold. He had a right to this amount of purchase money, and that was what the libellant sought to obtain from him. That was substituted in lieu of the cotton. To that sum, then, which was the real value of the cotton to him, the amount for which it had been sold, he is now entitled under the decree for restitution. This would have been the measure of damages had *Canter* brought trover for these goods. *Kennedy vs. Strong*, 14 Johns. 128. In replevin the same result, would have happened; and it is stated by the court to be no more than an indemnification. *Rowley vs. Gibbs*, 14 Johns. 385.

But this seizure has been decided to be illegal and groundless. It was made upon a claim of right which has been disaffirmed. It is essentially a seizure without probable cause.

In the case of *Gelston vs. Hoyt*, 13 Johns. 30, and 3 Wheat. 46, it was held in the state courts as well as here, that a decree of restitution was conclusive, that the seizure was illegal, and that where such seizure was made without legal process, such decree intitled the party to recover in an action of trespass to the amount of the damage actually sustained by the seizure. Here the seizure was made through the intervention of the process of the court, but the only difference which is thereby produced is, that the claimant is not compelled to resort to an action of trespass to recover his damages; they may be awarded in the principal suit.

The general rule established in the case of the *Apollon*, 9 Wheat. 373, is that the party who seizes, seizes at his peril. The rule for estimating damages in that case was the actual value of the property with interest. 9 Wheat. 377.

But the professed object is admitted to be *indemnification*. 12 Wheat. 17. How is that indemnification to be afforded? By placing the party where he would have been, if no such proceedings had been instituted.

The doctrines of the civil law may furnish the proper rule.

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2 Bro. Civ. & Ad. Law, 407. *Venius, Com.* 889. *Digest,* B. 4. T. 4. s. 33, p. 166. *Inst. B. 4. T. 16.* s. 2.

The amount of the stipulation entered into in the district court, furnishes no rule for damages; excepting so far as it operates in favour of the sureties. Had no stipulation been required by the court, they still might have gone on to assess damages. It is not by the stipulation that the party subjects himself to the jurisdiction and judgment of the court, but by the very fact of filing his libel and proceeding in his suit. 10 Wheat. 446.

Mr Ogden, for the appellees, argued; that this was a claim for damages in a case where one judge had decided in favour of the claimants or appellees; and the appellees were now called upon to respond in damages, to an extent which, were the appellees private persons, would produce their ruin. The claim, he contended, was against every principle of law. In case of a seizure by a revenue officer, a certificate from the judge of probable cause will excuse damages. In case of capture, probable ground for making the capture is not a case for damages. There has been no case in which mere civil proceedings in a court to establish a supposed right, has exposed the party to such liability, unless the proceedings have been malicious. The penalty is costs and expenses, in cases of the former description.

In the case of *Gelson vs. Hoyt*, the vessel was acquitted, and a certificate of probable cause was refused by the district judge. Had the district court condemned the vessel in that case, would it have been said there was no probable cause? The *Apollon*, 9 Wheat. 373, was a case of capture without probable ground of proceeding.

1. Inasmuch as there was a decree of a competent court, that the seizure made by the appellees was one they had a right to make; this is not a case for damages.

2. It was also a case of first impression. It was a new case, and the party had a right to bring it before a court of the United States for examination. This also prevents its being a case for damages. The *Lewis*, 2 Dodson, Ad. Rep. 210.

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Suppose the appellant entitled to damages. The decree of the circuit court of South Carolina was a final decree, or this court had no jurisdiction on the first appeal. If the party was entitled to damages, he should have presented his claim to the circuit court; not having done so, he could not prefer such a claim when the case went back on the mandate of this court. The matter in dispute was the cotton. It was sold by order of the court, and the proceeds paid into court. Those proceeds were all the court would look to, in any view of those proceedings. All cases of sale by a marshal would bring up claims to damages. The test of the value of the goods, and the sum in controversy between parties, is properly ascertained by sales, under the order or authority of a court by a regular officer.

It is said that if the cotton had not been taken out of the hands of Canter, by the proceeding of the appellees, it would have sold for more. He had at all times the right to take it out of the possession of the marshal by an appraisement and security.

As to probable cause exempting parties from damages. Cited, 1 Wheat. 21. 2 Rob. Ad. Rep. 132. *Rose vs. Himely*, 4 Cranch, 41.

There is no difference between actions for marine trespass, and civil proceedings, in the law of damages. *Marianna Flora*, Wheat. 58. *The Palmyra*, 12 Wheat. 17. 2 Bro. Civ. & Ad. Law, 100, 105, 398. *The Apollo*, 1 Hag. Ad. Rep. 306.

As to the costs of the appeal to this court. The counsel fees are a reasonable, but it may be doubted if they are a legal claim. 3 Dal. 301. 9 Wheat. 309. It is said in the latter case, that the allowance of counsel fees is in the discretion of the court. The case is not then a case for damages. If it is such a case, the appellant has waived them.

Mr Webster in reply. A view of this case may be taken, differing entirely from that which is entertained by the counsel for the appellees.

The vessel on board of which the cotton was originally shipped was wrecked. Salvage was decreed by the court at Key West, to be paid out of the proceeds of the cargo;

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and Canter purchased the cotton at the sale made under the order of the court, and shipped it to Charleston. The right of the court at Key West to proceed against the property saved, for salvage, was denied; and at Charleston, the underwriters seized the property. Canter was in possession of the property under the decree of a court, and his right to the property was afterwards confirmed in the circuit court, and in this court.

This is the case of an action for a marine tort or trespass, not a question of prize. Jurisdiction of the case was taken on the ground of the case being of this character. It is an action in the admiralty to try the right of property between parties thus situated. What are the principles which apply to such a case? Not those which operate in revenue cases. In those cases, certificates of probable cause are allowed, because it is the duty of the officer to act, and if he proceeds on reasonable grounds he is protected. Cases of prize rest on similar principles; those of policy.

This case is not of such a character. The courts of common law and admiralty had concurrent jurisdiction of the case, and the insurance offices might have brought trespass at common law. They have chosen a proceeding in the admiralty, *in rem*, and they have taken the goods out of the possession of the owner. Goods cannot be taken without the taker being responsible in damages. In a suit at common law, bail would have been given, and the owner would have been left in the use of his property. The proceeding was like replevin for goods, where security is given to respond in damages.

Had Canter a right to any thing beyond what he received? To ascertain his loss, the value of the property at the time it was taken out of his possession must be adverted to. The property was taken out of his possession by the libellants; they elected this as their remedy, and one ordinarily leading to loss: and it is not for them to complain when they are called upon to make recompense for the loss. Cases of this kind arising on land are frequently tried. -In all cases where property is seized unlawfully, the actor must respond in damages. It is no answer in such cases to say the party was proceeding in the course of regular litigation. He proceeds at his peril.

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Every man may litigate at the charge of costs; but if in his proceedings he will change the possession of the property he claims, then he must indemnify the real owner when the claim is decided against him. In case of marine trespass, it is always in the equitable powers of the court to give damages, and the circuit court should have given them instead of putting the appellant to a separate action.

It is said that Canter should have made a claim to damages in the circuit court. The case was brought before the court by the appellees, on its former appearance here, and was sent back for further proceedings. It was in the power of the circuit court, when the case was again before them, to do all that the appellant could properly claim. Restitution, which the appellant was entitled to, was not to be made by restoring the thing itself; restitution could only be made by placing the appellant in the situation in which he was before the seizure.

Mr Justice Story delivered the opinion of the court.

This case was formerly before this court, upon an appeal taken by the original libellants, the American and Ocean Insurance Companies, to the decree of the circuit court, awarding restitution of the property to the claimant, Canter, with costs. That decree was affirmed by this court, and a mandate issued to the circuit court, commanding "that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the appeal notwithstanding." The case is reported at large in 1 Peters's Rep. 547.

When the case came before the circuit court upon the mandate, Canter made an application to the court to refer the same to the proper officer to examine into the damages sustained by him in consequence of the proceedings of the libellants, and to report thereon. A reference was accordingly made to the register to ascertain the damages; and when the case came on before him, the libellants entered a protest against any such proceedings, upon the grounds that the mandate gave no authority to inquire into damages; that none had been in fact awarded, either by the district,

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circuit, or supreme court ; and that the libellants were not in any manner liable for damages. The register, notwithstanding the protest, proceeded to inquire into the damages, and made his report thereon to the circuit court, where the same grounds of objection were again taken by the libellants. The court upon the hearing, asserted the right to inquire into the damages, as a matter undisposed of in the former decree ; but denied any allowance of them upon the merits, and decreed costs and expenses only to the claimant. From this last decree both parties have appealed to this court ; and the case now stands before us for judgment upon these cross appeals.

It is proper to add, that the libellants in their original libel prayed that the three hundred and fifty-six bales of cotton might be decreed to them, with *damages* and costs ; and that the claimant Canter, in his claim, also prayed for restitution of the cotton, with *damages* and costs. The district court decreed restitution to the libellants of part of the cotton, and dismissed the libel as to the residue, without any award of *damages* on either side. Both parties appealed from this decree to the circuit court ; where, upon the hearing, the decree of the district court was reversed, and restitution of all the cotton was decreed to Canter, with costs, (as has been before mentioned;) but without any award of *damages*, or any express reservation of that question in the decree.

Two questions have been made and argued at the bar. The first is, whether, under the circumstances, the inquiry into damages could be entertained by the court below, after the cause was remanded for execution by the mandate of this court. The second is, whether, if such proceedings could be had, the present is a fit case for damages.

In respect to the last question, if we felt at liberty to entertain it, we should have no difficulty in concurring in the opinion of the circuit court, that this case was not a fit one for an award of damages. The proceedings of the libellants were in the ordinary course, to vindicate a supposed legal title to the property. There is no pretence to say, that the

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suit was instituted without probable cause, or was conducted in a malicious or oppressive manner. The libellants had a right to submit their title to the decision of a judicial tribunal, in any legal mode which promised them an effectual and speedy redress. They have failed; not so much from any infirmity in their original title, as from the sentence of a court, of competent jurisdiction, (whose very jurisdiction was the matter in question), having been adjudged to be conclusive upon that title. Where parties litigate in the admiralty, and there was a probable ground for the suit or defence; the court consider the only compensation which the successful party is entitled to, is a compensation in costs and expenses. If the party has suffered any loss beyond these, it is, as was justly observed in the opinion of the circuit court, *damnum absque injuria*.

But we are of opinion, that the question of damages is not now open before this court. The original decree of restitution with costs, without any allowance of damages, or any express reservation of that question, was a virtual denial of damages, and a final decree as to the demand of damages set up by Canter in his original claim. It was his duty at that time to have filed a cross appeal, if he meant to rely upon his claim for damages; and not having then done so, it was a waiver of the claim, and a submission to the decree of restitution and costs only. It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon *final* decrees only, that causes should not come up here in fragments, upon successive appeals. It would occasion very great delays, and oppressive expenses. We have already had occasion to advert to this subject in the cases of the *Santa Maria*, 10 Wheat. Rep. 481. The *Palmyra*, 10 Wheat. Rep. 502. *Chace vs. Vasquez*, 11 Wheat. Rep. 429. We wish it now to be understood by the bar, as the settled practice of this court, that wherever damages are claimed by the libellant or the claimant in the original proceedings, if a decree for restitution and costs only passes, it is a virtual

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denial of damages; and the party will be deemed to have waived the claim for damages, unless he then interposes an appeal, or cross appeal, to sustain that claim.

As to the costs and expenses, we perceive no error in the allowance of them in the circuit court. They are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court. And, besides, it may be added, that no appeal lies from a mere decree respecting costs and expenses.

The decree of the circuit court is therefore affirmed with costs.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of South Carolina, and was argued by counsel; on consideration whereof, it is ordered and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby affirmed, without costs, for the libellants.

DANIEL STRINGER, PHILIP M. LINGER, NICHOLAS, MARGARET AND JOSEPH LINGER, PLAINTIFFS IN ERROR vs. THE LESSEE OF JOHN YOUNG, ARCHIBALD M'CALL, MARY CADWALLADER, WILLIAM REED AND ANNE HIS WIFE, AND HARRIET M'CALL.

On a trial in ejectment, the plaintiffs offered in evidence a number of entries of recent date, made by the defendants, within the bounds of the tract of land in dispute, designated as "Young's four thousand acres;" and attempted to prove, by a witness, that Young, when he made the entries, had heard of the plaintiffs' claim to the land. The defendants then offered to introduce as evidence, official copies of entries made by other and third persons since the date of the plaintiffs' grant; for the purpose of proving a general opinion, that the land contained in the plaintiffs' survey, made under the order of the court, after the commencement of the suit, were vacant at the date of such entries; and to disprove notice to him of the identity of plaintiffs' claim, when he made the entries under which he claimed. This evidence was unquestionably irrelevant. [337]

Entries made subsequent to the plaintiffs' claim, whatever might have been the impression under which they were made, could not possibly affect the title held under a prior entry. [337]

The admission of evidence which was irrelevant, but which was not objected to, will not authorize the admission of other irrelevant evidence offered to rebut the same, when the same is objected to. [337]

The land law of Virginia directs that, within three months after a survey is made, the surveyor shall enter the plat and certificate thereof in a book, well bound, to be provided by the court of his county, at the county charge. After prescribing this, among other duties the law proceeds to enact, that any surveyor failing in the duties aforesaid, shall be liable to be indicted. The law, however, does not declare that the validity of such survey shall depend in any degree on its being recorded. [338]

The chief surveyor appoints deputies at his will; and no mode of appointment is prescribed. The survey made by his deputy is examined and adopted by himself, and is certified by himself, to the register of the land office. He recognizes the actual surveyor as his deputy in that particular transaction, and this, if it be unusual or irregular, cannot affect the grant. [340]

Objections which are properly overruled, when urged against a legal title, in support of an equity, dependent entirely on a survey of land for which a patent has been issued, can have no weight when urged against a patent regularly issued in all the forms of law. [340].

In Virginia, the patent is the completion of the title, and establishes the performance of every pre-requisite. No inquiry into the regularity of those preliminary measures, which ought to precede it, is made in a trial at law. No case has shown that it may be impeached at law; unless it be for fraud. Not legal and technical, but actual and positive fraud, in fact, committed by the person who obtained it; and even this is questioned. [340]

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It is admitted to have been indispensably necessary to the plaintiff's action, to show a valid title to the land in controversy; and that the defendants were at liberty to resist the testimony, by any evidence tending in any degree to disprove this identity. But the defendants were not at liberty to offer evidence having no such tendency, but which might either effect a different purpose, or be wholly irrelevant. The question of its relevancy must be decided by the court; and any error in its judgment would be corrected by an appellate tribunal. The court cannot perceive that the omission of the surveyor to record the survey, or the fact that the survey was made by a person not a regular deputy, had any tendency to prove that the land described in the patent was not the land for which the suit was instituted. [342]

The warrant for the land in controversy was entered with the surveyor of Monongalia county on the 7th of April 1784. At the May session of that year, the general assembly of Virginia divided the county of Monongalia, and erected a new county, to take effect in July, by the name of Harrison. The land on which the plaintiff's warrant was entered, laid in the new county. The certificate of survey is dated in December 1784, and in accordance with the entry, states the land to be in Monongalia.

The land law of Virginia enacts that warrants shall be lodged with the surveyor of the county in which the lands lie, and that the party shall direct the location specially and precisely. It also directs despatch in the survey of all lands entered in the office. No provision is made for the division of a county between the entry and the survey. The act establishing the county of Harrison, does not direct that the surveyor of Monongalia county shall furnish the surveyor of Harrison with copies of the entries of lands which lay in the new county, and with the warrants on which they were made. In this state of things the survey of the land in controversy was made by the surveyor of Monongalia; the plat and certificate on which the patent was afterwards issued, were transmitted to the land office, and the patent described the land as in Monongalia county. No change was made in the law until 1788. This will not annul the patent, or deprive the unoffending patentee of his property. [343]

The misnomer of a county, in a patent for land, will not vacate the patent. It will admit of explanation, and if explanation can be received, the patent on which the misnomer is found, is not absolutely void. [344]

ERROR to the district court of the western district of Virginia.

This was an ejectment brought by the defendants, against the plaintiffs in error, in the district court of the United States for the western district of Virginia, exercising circuit court powers, for the recovery of a tract of four thousand acres of land in the said district, being a tract lying in the north-east corner of a large connexion of surveys made together, owned by Reed and Ford, the said Youngs, Thomas Lardley, and others; some in one name and some in others, as appearing by the surveyor's diagram. There was

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a verdict and judgment for the plaintiffs, which this writ of error is brought to reverse.

During the trial the counsel of the defendants tendered three bills of exceptions to opinions of the court, which are signed, sealed, and made part of the record, and which are substantially as follows:

The first bill of exceptions states that the plaintiffs below, on the trial of the case before the district court, introduced a grant for the lands claimed, which grant is described in the third bill of exceptions, and the plat and report of the surveyor made in the cause.

That the plaintiffs also offered in evidence a number of entries of recent date, made by the defendant Stringer, within the bounds of the said land, as designated on said report, as John Young's four thousand acres, being the land claimed by the plaintiffs, and attempted to prove by a witness that Stringer, when he made those entries, had heard of the plaintiffs' claim to the land in controversy. The defendants thereupon offered as evidence official copies of entries made by others and third persons, since the date of the plaintiffs' grant, for the purpose of proving a general opinion that the lands claimed were vacant at the date of the said entries, and to disprove notice to Stringer of the identity of the plaintiffs' claim, when he made the entries under which the defendants claim to hold. The court decided this evidence to be inadmissible, to which the defendants excepted.

The second bill of exceptions, after setting out the plaintiffs' grant, states: that the defendants then offered in evidence the surveyor's book, of Monongalia county, to prove no such survey had ever been returned to the office of said surveyor, and recorded in the books of the said surveyor; and further offered to introduce evidence to prove that Henry Fink, the deputy upon whose survey the grant purports to have issued, resided at the date of the said survey in Harrison county, and was not then a deputy surveyor of Monongalia county. The defendants offered the said evidence to prove that no survey had ever been made, and that the register issued the grant without proper authority; on which

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account the same was void. The plaintiffs objected to this evidence as inadmissible for the purpose stated; and the court rejected it as such. The defendants counsel then offered the same evidence to disprove the identity of the land contained in the plaintiffs grant with that now claimed by the plaintiffs, and represented by the surveyor's report, as contained by the blue lines thereon, and thereon designated by the Roman numeral V. The court also rejected the said evidence for the last mentioned purpose, and the defendants excepted.

The third bill of exceptions states; that the plaintiffs on the trial of the cause introduced a grant in the words and figures following, setting it forth at large. The grant is issued to John Young, the lessor, and dated the 10th of June 1786, for four thousand acres, the premises in question; bounded as follows, to wit: describing it by metes and bounds.

The defendants thereupon offered in evidence a certified copy of an act of assembly of Virginia, establishing the county of Harrison, and a copy of the certificate of the survey on which the plaintiffs' said grant issued, dated December 13th 1824, after the act for erecting the county of Harrison was in operation; and proved that the land purporting to be granted, and the land claimed, as having been surveyed, lay in the bounds of the county of Harrison; and, upon this evidence the counsel moved the court to instruct the jury, that, if they were satisfied from the testimony that the lands lay in a different county from that in which the survey imports to have been made, then the grant was void at law; and that it was not competent for the plaintiffs to contradict the call for the county in the grant. But the court delivered its opinion that the foregoing facts, if true, should not avail the defendants in the present action, as the grant was not void: to which opinion the third bill of exceptions is taken.

The case was argued by Mr Smyth, for the plaintiffs in error, and by Mr Dodridge, for the defendants.

For the plaintiffs, on the first bill of exceptions, it was con-

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tended ; that the court admitted illegal evidence offered by the plaintiffs below, and stated in the bill, to go to the jury. That the court rejected evidence offered by the defendants below, which was proper to counteract the said evidence offered by the plaintiffs.

On the second bill of exceptions it was argued, that the evidence offered was legal, and should have been admitted to the jury.

On the third bill of exceptions, the counsel for the plaintiffs contended ; that the court should have instructed the jury that the plaintiffs' grant was not evidence to support their claim to the land in controversy. That the court should have instructed the jury, that if they were satisfied, from the testimony, that the lands lay in a different county from that in which the survey purports to have been made, that the grant was void. That the court should have instructed the jury, that the plaintiffs could not, by parol evidence, contradict the call for the county in their grant. That the court erred in giving no instruction on that point, although required so to do by the defendants ; and on the whole record, the plaintiffs in error contended ; that this court should have decided that the grant under which the plaintiffs claimed was void. That the instruction of the judge to the jury, that it is no objection to the plaintiffs' grant that the survey was made by a surveyor of Monongalia, in the county of Harrison, is erroneous. That the court erred in admitting hearsay evidence to identify corners, and establish boundaries, of the lands claimed by the plaintiffs ; and that the verdict is contrary to evidence ; and therefore the court should have ordered a new trial.

Smyth, for the plaintiffs in error, argued ; that the court admitted the plaintiff below to introduce illegal evidence, as stated in the first bill of exceptions.

They produced copies of a number of entries of recent date, made by Stringer, one of the defendants below, within the bounds described in the surveyor's report ; and attempted to prove by a witness, that when those entries were made, the said Stringer had heard of the claim of the plaintiffs. This

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was an attempt to deprive an individual of the right to enter vacant land, because he has heard that another has a claim to it. Has there not been an attempt, sanctioned by the court, to lead the jury to believe that having heard that another had a claim to the land, the defendants had no right to locate it, although it might be vacant? Has there not been an attempt to lead the jury to believe that the law of purchaser with, or without notice, had some bearing on the cause? The doctrine of notice has no application to purchasers from the government. If the plaintiffs' grant gave no title, notice to Stringer would not make it good against him. Suppose that Stringer and some other person had made entries on the same day, Stringer having heard of Young's claim, the other not having heard of it; will it be contended that the one could, and the other could not, obtain a right? What had the plaintiffs to do with these entries of the defendants? They could not stand in the way of the claim of the plaintiffs, if they had a grant for the land. The tendency of this evidence, if not the object of producing it, was to perplex and mislead the jury, and excite a prejudice against the defendant Stringer. And the law is that "illegal or improper evidence, however unimportant it may be to the case, ought never to be confided to the jury; for if it should have an influence upon their minds, it will mislead them; and if it should have none, it is useless, and may at least produce perplexity." 2 Wash. 281.

The court erred in rejecting evidence offered by the defendants, which was proper to rebut the said evidence offered by the plaintiffs.

The illegality of Young's evidence, we admit: but as the court received it, thereupon it became necessary and proper to counteract it. Copies of entries, if evidence for the one party, were evidence for the other; and a general reputation that the land was vacant, was persuasive evidence that Stringer had no notice of Young's claim, and believed the land to be vacant. This evidence was important to remove prejudice; and refusing to receive it secured the effect of the plaintiffs' illegal evidence.

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The evidence stated in the second bill of exceptions should have been left to the jury.

The evidence offered was, the book of the surveyor of Monongalia; and testimony that Henry Fink, who made the survey, was not a deputy of the surveyor of Monongalia in December 1784, when the plaintiffs' survey was made. You cannot, in a court of law, go into the consideration of a deed; but you may avoid it, by proving fraud in the execution. If there was no survey, or only a survey by Henry Fink, as deputy surveyor of Monongalia, when in fact he was not so, the signature of the governor was obtained by fraud. There is fraud in the execution of the deed, which may be shown in a court of law; so this evidence should, for that purpose, have been permitted to go to the jury.

The plaintiffs below were to identify their land; their grant called for land in Monongalia, and their survey was made by Henry Fink, as deputy surveyor of Monongalia; the surveyor's book was offered to disprove the identity of the land; the judge refused to receive the book as evidence, no matter what it proved. It never was heard before that the survey was not evidence on the question of identity. And if the survey is evidence, the surveyor's book is evidence. The grant calls for a corner to the lands entered by George Jackson. The book might show where those lie. The book might prove that the survey began on the head of the Glad Fork of Stone Coal creek, and extended down it. The land claimed includes the right hand fork of Stone Coal, below the mouth of the Glad Fork, and does not include the mouth of the Glad Fork, which is a branch of the right hand fork. The grant does not say, as the survey does, "beginning at the head of the Glad Fork of Stone Coal creek." Hence the necessity of exhibiting the survey; because it contains evidence of the locality, not in the grant. If the surveyor's book was legal evidence, it should have been left to the jury, whether offered for one purpose or another; but it was rejected by the court.

On the question of identity, the copy of an entry is evidence. 5 Wheat. 359, 362.

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The court should have instructed the jury, that the plaintiffs' grant was not evidence to support their claim.

The defendants produced the act of assembly, which established Harrison county on the 20th of July, 1784; a copy of the plaintiffs' survey, dated December 13th 1784, signed Henry Fink, assistant to S. Hanway, S.M.C.; and proved that the lands in controversy lay in Harrison, at the date of the survey. The court instructed the jury, that if the facts were so, it could not avail the defendants in this action; and that the grant was not void. If we admit, for the sake of argument, that the grant is not void, it can take no lands elsewhere than in Monongalia. And however land in another county may seem to suit the description, they cannot be the granted lands. The grant is no evidence of title to lands in Lewis, a county formed from Harrison. The jury should have been instructed that the grant was no evidence of title to land which lay in Harrison at the date of the survey. The commonwealth has granted lands in Monongalia. If you cannot find them there, you can find them no where else. Call a grant for lands in the county of Brooke pass lands lying in the county of Princess Anne? A party must identify the land according to the call of his grant. If he calls for crossing James river, he must cross James river. Is not the call for the county the most important of all calls?

Should it be contended that the surveyor of Monongalia might survey, in Harrison, lands entered in Monongalia before Harrison county was formed, it is answered, this was never authorized: and in this act the sheriff of Monongalia is specially authorized to complete his business in Harrison; but no such authority is given to the surveyor.

The court should have instructed the jury that the plaintiffs could not by parol evidence contradict the call for the county in the grant under which they claim.

There is no latent ambiguity. In Dowlie's case, 3 Coke's Rep. 9, 10, the grant was held void because the parish was wrong named. But if parol evidence could have been offered to contradict the call for the name of the parish, the grant would have been made good. A grant in the county of S. will not pass what lies in the county of D. 3 Bac.

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Abr. 389. But if parol evidence could have been received to contradict the call for the county, the grant would have been made good. A grant to one, as a knight, when he is an esquire, has been held void. But this would have been remedied, had parol evidence been admissible.

Parol evidence is admissible to vary or contradict the grant. 2 Cranch, 29. The name Hosmer in a grant, cannot be proved by parol to be Houseman. 12 Johns. 77. In the appendix to Pothier on Obligations, the law is thus laid down (Vol. 2, p. 210): "But where there is an existing subject, to which a description may be properly applied, parol evidence cannot be allowed that a different subject was intended." Here there is an existing subject, the county of Monongalia, to which the description, lying in the county of Monongalia, may be applied.

The court was asked to instruct the jury, "that it is not competent to the plaintiffs to contradict by parol the call for the county in his grant," and gave no instruction on that point. The court, when asked for an instruction, are bound to give the instruction asked for, or another on the same point. 2 Wash. 272, 273.

The court should have decided, that the grant under which the plaintiffs claimed, was void.

It is contended, that a grant is void if there is an insufficient or false description; or if it has been obtained on a false suggestion; or if it has been obtained by fraud; or if it has been obtained against the rules of the land office. And that in all these cases, if the objection appears on the face of the grant, or if it judicially appears, the grant is void in a court of law.

As to an insufficient or false description. If lands are described as lying in a wrong parish, the grant is void. Cited 3 Bac. Ab. 386. 2 Co. Rep. 10. 2 Mod. 3, 4. Anderson, 148. 4 Cruise, Dig. 225.

It is therefore contended; that this grant is void, for an insufficient and false description. And it always was within the jurisdiction of a court of law to declare, that for such a defect, a grant or any other deed of conveyance was void. See 14 Vin. Abr. 100. 2 Co. Rep. 33. Hobart, 171.

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It has been decided that to omit the name of the county will not vitiate the grant, if there is otherwise a sufficient description of the land. But to give the name of the county, and give it falsely, is a defect that never was excused. 5 Mumf. 520. Let us consider the consequences to which the false description in the grant in question would lead. One searches the records of Harrison, and the books of the commissioners of the revenue; he finds no notice of any such grant; he searches the office of the surveyor of Harrison and Monongalia; he finds no survey recorded.

Recording a deed in a wrong county is a fatal objection, when urged by a purchaser without notice. So, after the district of Zanesville was formed from that of Marietta, the lands in Zanesville district could not be purchased at the office of Marietta. If lands ought to be conveyed by a deed recorded in the proper county, so they ought to be granted in the proper county. 4 Wheat. 478, 479. 5 Cranch, 92. 1 Wash. C. C. Rep. 322.

Of the false suggestion. The commonwealth's grant issues on the suggestion of the grantee, and on evidence offered by him, true or false, that he has complied with the law. A grant on a false suggestion is void. The king being deceived, his grant is void. He should be truly informed. If the suggestion is false of the parties' knowledge, the grant is void. 5 Bac. Ab. 602. 10 Co. Rep. 112. 1 Co. Rep. 46, 52. Skinn. 656. 5 Co. 94, 113. Yelv. 48: "Lying in Monongalia," is the suggestion of the grantee, and it is false. The grant is notice to all men that the grantee does not claim lands in Harrison. The commonwealth is deceived, and every citizen is deceived who may see this grant, and locate the lands claimed in Harrison.

The king's grant can do no wrong; rather than do wrong, it is void; where it would do wrong, it is void. 1 Co. Rep. 44. Shep. Abr. 91. Here fees are due to the surveyor of Harrison county and the college. The grant is issued on a survey made by a man falsely pretending to be a deputy surveyor of Monongalia; the surveyor of Harrison is certainly defrauded.

The grant has been obtained by fraud. The register had
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no authority to issue a grant for lands in Harrison. In this way all the vacant land in Harrison might have been surveyed as in Monongalia, and granted as in Monongalia, and thus the surveyor of Harrison be defrauded of his fees. They are a part of the consideration ; a portion of them is appropriated to the college. The governor supposed that the surveyor's fees were paid. The commonwealth is interested that her officers shall receive their dues, and that the college shall receive the fund appropriated for the support of education. 5 Wheat. 293, 303. 5 Mumf. 522.

A grant fraudulently obtained is void. In the case of Huidekōper's lessee vs. Burrus, judge Washington decided that a patent for land is only *prima facie* evidence of title; but if the previous steps for vesting a title be not performed, proof of such omission will defeat the same. 5 Harris & Johns. 223. 1 Wash. C. C. Rep. 109. 1 Harris & Johns. 370, 2 Harris & Johns. 456, 458. 1 Hen. & Mumf. 306, 307.

Perhaps it will be said that although the grant might have been repealed by petition in chancery, yet it is good in a court of law. It is contended that the statutory provision of Virginia for repealing grants, does not affect the authority of the common law courts to declare grants void. It is a new remedy in some cases ; in others it is conclusive ; in others it does not apply ; and this is one of those latter cases. There is no law by which this grant may be repealed : for he who would repeal a grant, must have a prior equitable claim. We are taught that for every wrong there is a remedy ; but there is no remedy for this wrong, unless a court of law may adjudge this grant void. Might one have taken all the good lands in the county of Cabell by plats fabricated, purporting to have been made by the surveyor of Henrico, had them granted as lands lying in Henrico, sold them as lands lying in Henrico ; and have the title adjudged good, because there was no prior equitable claimant to ask for a repeal of the grant ?

The providing of a remedy by the repeal of patents, obtained regularly and without fraud, in favour of a prior equitable claimant, did not take away the power of courts of law to adjudge grants void for insufficiency or fraud. The

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English courts of law declare grants and other deeds void, on trials of writs of right and ejectments. Virginia has adopted the common law of England. Where is the act of assembly that takes this power from her common law courts?

The law which avoids a grant, is the same in Virginia as in England. Judge Blackstone says, a patent is void in a court of law, if the cause appears on its face. 2 Blacks. 348. Judge Roane says the same thing. 1 Mumf. 141. Is it required that the falsehood and the truth shall both appear on the face of the grant? Certainly no. The falsehood appears on the face of the grant; the truth appears by the evidence in the cause; and then the grant is adjudged void. In this case the truth appears by the record, and that which avoids the grant, appears on its face. It calls for lands in Monongalia. If the land claimed is identified in Harrison, that circumstance renders the grant void; for on its face, it appears that the land was surveyed after Harrison became a county.

When it appears judicially that the king is deceived, his grant is void. Skin. 659. 6 Mumf. 120.

It is not necessary to repeal a grant, unless that grant, unrepealed, confers a title: but this grant confers no title to land in Harrison, therefore it is unnecessary to repeal it.

With regard to deeds, a distinction has been taken, that you cannot, in a court of law, invalidate them by proving a fraud in the consideration; but that you may prove a fraud in the execution. Here we say the execution was obtained by fraud. The governor was, by falsehood, induced to execute the grant. Would he have signed it had he been truly informed? Certainly not.

It has been decided in Virginia, in a similar case, that a grant might be declared void in a court of law; and that decision has never been declared not to be law. Hambledon vs. Wells.

Mr Doddridge, for the defendant in error. The matters alleged in the first bill of exceptions are wholly unimportant. The testimony offered and rejected, was not receivable for any purpose. The plaintiffs stood on the oldest grant, or the only grant appearing in the cause; and in such a case, besides

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the formalities affirmed by the common rule, the only question between the parties was that of identity, and neither for this nor for any other purpose were they permitted to look behind the grant. This will hereafter be proved; when considering the questions raised by the second and third bills of exceptions. The evidence offered and given by the plaintiffs, except the grant and surveyor's report, was unnecessary; as he had nothing to do with the conscience of Stringer, perhaps, it might be admitted that this testimony was improper; yet it was not objected to. But the testimony offered by the defendants and rejected, was improper in every view. It was offered to prove a general belief that the bond was vacant; a fact which, if admitted, could avail them nothing.

The questions raised by the second bill of exceptions are:

1. Whether a defendant, when a legal grant for the land claimed, and the official survey on which it is founded, are given in evidence against him, can avoid the grant, by showing, by the book of surveys, that the survey was not recorded; and by parol proof that the deputy was not the deputy of the surveyor certifying the plat, but of another surveyor?
2. Whether the defendant can offer the same evidence to disprove the identity of the land?

The question raised by the third bill of exceptions was this. The official plot and certificate of survey is dated the 13th of December 1784; and the plaintiffs' grant thereon the 10th June 1786. The county of Harrison was created the 3d of May 1784. The law commenced in force the 20th of July 1784. So that when the survey bears date, the county of Harrison was in being, and the land in fact was in that county; and the question is, ought the court to have instructed the jury that, if they found these facts, the grant was void at law, and that the plaintiffs could not disprove the descriptive call, "Monongalia county," in the survey and the grant?

The questions raised by the second and third bills of exceptions may be considered together.

1. The first position is, that the parties can go behind the grant for nothing in an action at law, because evidence before the grant would take the party by surprize; and because, the grant is, *ipso facto*, an appropriation, and the

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question to be determined is the identity of the thing granted. Again; in the case of a land office warrant, in Virginia, the entry is, and the survey is not, an inceptive appropriation. The title is transferred by the grant, towards obtaining which the survey is but a progressive step. Even the entry cannot be brought before the court. *Wilson vs. Mason*, 1 Cranch, 45, 101. *Johnston vs. Brown*, 3 Call, 359, 268. *M'Arthur vs. Browder*, 4 Wheat. 488, 491. *Finley vs. Williams*, 9 Cranch, 164, 167.

In the case of a military warrant under the colonial government, it was otherwise. There was no entry, and of course, the survey was an inceptive act of appropriation. *Taylor vs. Brown*, 5 Cranch, 234, 241.

It follows that the warrant in the latter case, without any other act, conferred on the surveyor an authority to survey; whereas, under the land law of Virginia, of May session 1779, ch. 13, the warrant must be lodged with the surveyor, and the party must make an entry on the land he selects. This entry, alone, confers on the surveyor the authority to survey; and his certificate of survey proves as well that the possession of the warrants were necessary, as the entry under which he surveys; as under the military warrant it proved the possession of the warrant. That is, it proves the existence of the authority by which it was made. *Taylor vs. Brown*. 5 Cranch, 234, 241.

2. The whole duty of a surveyor, in relation to a survey and recording it, is prescribed by the act of 1779, ch. 13. 10 Hen. S. L. page 57.

These duties are again prescribed in 1784, by an act reducing into one the several acts concerning surveyors; 10 Hen. S. L. page 352: but by the latter act these duties are not varied. These laws require the surveyor to run, and plainly mark and bound the survey, except where the same is bounded by water courses, the lines of surveys before made. They require him, in his certificate, to note the boundaries, courses, and distances, variation from the true meridian, and to set down the names of adjoining owners, and of the hundreds, where any are established; and to observe a due proportion between length and breadth. The

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law does not expressly require the county to be named, but it is admitted that it does so impliedly.

Yet, as a survey is a progressive step, and those duties merely directory, it has been holden that the name of the owner of the survey itself may be mistaken in the certificate and grant, and both contradicted by parol testimony; as where the survey imported to be made for one Vinegard, it was allowed to be proved that, in fact, it was made for one Unrod. *Johnston vs. Buffington*, 1 Wash. 116.

That the duties imposed on the surveyor are directory, and the omission to perform them does not affect the right of the party, is settled by this court in *Craig vs. Radford*, 3 Wheat. 594, and several other cases.

3. The name of the county is matter of general description, and although a surveyor ought to state it truly, yet if he does not, the name of the county may as well be corrected by evidence as the name of the owner. If he misstate it, he fails in his duty; but this shall not injure the party.

In a grant, a description that will identify the land is all that is necessary. *M'Arthur vs. Browder*, before quoted. If even a location have certain material calls sufficient to support it, and to describe the lands, other calls less material and incompatible with the essential calls may be disregarded. *Taylor vs. Brown*, 5 Cranch, 234, 241. Now, water courses are natural, material, permanent and essential calls; while the lines of a county are immaterial and artificial ones.

4. The omission of the name of the county does not vitiate a grant, which proves this description immaterial. *M'Lean vs. Tomlinson*, 5 Mumf. 220, 223.

The patent in that case, on its face, purports to have issued on a certificate of survey, bearing date the 14th of July 1773; on warrants of a subsequent date in that and the next year, and the name of the county is left blank. The court decided the omission to be immaterial, the patent containing other sufficient descriptions, as "at the round bottom" "on the Ohio," &c. &c.

The history of that title is as follows: general Washington procured a deputy surveyor of West Augusta to make a pri-

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vate survey for him in 1773. He possessed the filed notes, and afterwards purchased warrants to cover it of a date subsequent to his private survey. In October 1776, the counties of Monongalia, Ohio and Yohogania, were formed out of West Augusta. See Hen. S. L. Vol 9, 262, 269. The law creating these counties took effect the 8th of November 1777; 263. After this period, the surveyor of West Augusta ceased to be surveyor of either of those counties; yet on these private field notes, and of the acquired warrants, he returned a plat and certificate of survey; but not knowing into which of those new counties the land fell, he left the name blank.

Here the survey was made without any authority whatever; the special verdict having found the true date of the survey and warrants, and all this appearing on the face of the grant; and yet it was sustained as valid at law.

5. But if it were granted that the surveyors book of surveys could be produced for any purpose, it would follow of course, and, *a fortiori*, that the book of entries could also be produced; which would be contrary to the decisions of this court, and of the courts of Kentucky. If parties in another county were supposed to be ready to do this, then the real fact would appear, that the entries were made in Monongalia, while Harrison was part of that county, and remained unsurveyed at the time of the separation.

The date of the entry does not appear from the patent, and the true date of the survey does not appear in the case otherwise than by the certificate. This date should be controlled by the certificate that the lands are in Monongalia county, which they could not be at the date of the certificate. Or if the court would not sustain the position, then this court have already decided that the official certificate of a survey proves the authority by which the same was made, and therefore proves a good and valid entry made in Monongalia before the separation of the counties, and at that time remaining unsurveyed.

If it is contended that this entry ought to have been certified to the surveyor of the new county, the law on the subject is misunderstood. Prior to the act of October session,

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17th, ch. 51, there was no provision for so certifying an entry. See 12 Hen. S. L. 709. The preamble puts the matter beyond dispute.

An unsurveyed entry remains subject to forfeiture if not surveyed in time, and all the duties and responsibilities attached to that surveyor with whom the entry was made. Should he have stated the lands to have been in Harrison county at the time of survey? If so, he has made a mistake. Ought he to have recorded the survey, and did he fail to do so? Then he has, in both cases, failed in the discharge of a directory duty, merely; by which the right of the party is not impaired.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

This was an ejectment brought in the court of the United States for the western district of Virginia. The jury found a verdict for the plaintiffs, on which the judgment of the court was rendered; which judgment has been brought to this court by writ of error. At the trial, three bills of exception were taken to opinions given by the court to the jury, and the cause depends on the correctness of these opinions. The first bill of exceptions is in substance; the plaintiffs at the trial of this cause produced a grant, (setting it forth in words and figures therein.) This grant is issued to John Young, dated the 10th of June 1786, for four thousand acres, bounded as follows: Beginning at a black oak corner to land entered by George Jackson, and running thence N. 3° W. 1001 poles, crossing waters of Stone Coal creek to a beech, thence N 80° E 641 poles, crossing a branch of said creek to a white oak S. 3° E. 1001 poles, by lands surveyed for Thomas Laidley, to a white oak, and thence S. 80° W. 660 poles, crossing waters by lands of said waters to the beginning. Also the plat and report of the surveyor, Thomas Haymond, made in this cause, in pursuance of an order, &c. The plaintiff also offered in evidence a number of entries of recent date, made by the defendant Stringer within the bounds of the tract of land designated on said report as John Young's four thousand acres, being the land claimed by the plaintiffs; and attempted to prove by a witness, that Young, when

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he made said entries, had heard of the plaintiffs' claim to the land in controversy. The defendants thereupon offered to introduce as evidence, official copies of entries made by other and third persons, since the date of the plaintiffs' grant, for the purpose of proving a general opinion that the lands contained in the report and diagram of the surveyor, made in this cause, were vacant at the date of such entries, and to disprove notice to Stringer of the identity of the plaintiffs' claim when he made the entries under which the defendants claim; but the court declared its opinion to be that the said evidence was inadmissible, and rejected the same.

The testimony offered by the defendants was unquestionably irrelevant. Entries made subsequent to the plaintiffs' grant, whatever might be the impression under which they were made, could not possibly affect the title, and were therefore clearly inadmissible. This principle has never been controverted; but the plaintiffs in error insist that they had a right to introduce this testimony, in order to rebut other equally irrelevant testimony which had been offered by the plaintiffs in ejectment. This testimony was the recent entries made by Stringer, and the witness who proved that at the time of making them, he had no notice of the plaintiffs' claim. This testimony was undoubtedly irrelevant, and had it been opposed, could not have been properly admitted. Had the defendant moved the court to instruct the jury that it must be utterly disregarded, that it must not be considered by them as testimony, and this instruction had been refused, the refusal to give it would have been error. The defendant, however, has not taken this course; but has chosen to repel the testimony by other evidence, which was clearly inadmissible. Whether a case may exist in which improper testimony may be calculated to make such an impression on the jury that no instruction given by the judge can efface it, and whether in such a case testimony not otherwise admissible may be introduced, which is strictly and directly calculated to disprove it, are questions on which this court does not mean to indicate any opinion. It is unnecessary, because the testimony rejected by the court is not of this character. En-

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tries made subsequent to the plaintiffs' grant by others, can have no tendency to disprove the evidence of notice by the defendant when his entries were made.

The second bill of exceptions is in these words. Upon the trial of this cause, the plaintiffs, in support of the issue on their part, introduced a grant to the lessor of the plaintiffs in the words and figures following: "Patrick Henry, &c." The defendants thereupon offered to introduce the surveyor's book of Monongalia county, to prove no such survey had ever been returned to the office of said surveyor, and recorded in the book of said office; and further, offered to introduce evidence that Henry Fink, the deputy upon whose survey said grant purports to have issued, resided at the date of the said survey in Harrison county, and was not a deputy surveyor of Monongalia county. The defendants offered said evidence to prove the said grant issued without any survey having been made, and that the register of the land office issued said grant without proper authority, and that the same was therefore void. To the giving of which evidence the plaintiffs, by their counsel, objected, and the court declared its opinion to be, that such evidence could not be given for the purposes aforesaid, and rejected the same. Whereupon the defendants, by their counsel, offered the same evidence to disprove the identity of the land contained in the plaintiffs' grant with that now claimed by the plaintiffs, and represented by the figure in the said surveyor's report. But the court declared its opinion to be, that the said evidence ought not to be received for the last mentioned purpose.

In rejecting this testimony, the court decided that the non appearance of the survey on which the grant of the plaintiffs had been issued on the book of the surveyor of Monongalia county, where it ought to have been recorded; and the fact that the person who made the survey was not at the time a deputy surveyor of Monongalia county, could not avoid the patent; and that the evidence of those facts was consequently inadmissible.

The land law of Virginia directs that within three months after a survey is made, the surveyor shall enter the plat and

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certificate thereof in a book, well bound, to be provided by the court of his county, at the county charge. After prescribing this among other duties, the law proceeds to enact, that any surveyor failing in any of the duties aforesaid, shall be liable to be indicted, &c. The law, however, does not declare that the validity of such survey shall depend in any degree on its being recorded.

The act also directs, that the surveyor "shall, as soon as it can conveniently be done, and within three months at the farthest after making the survey, deliver to his employer or his order, a fair and true plat and certificate of such survey," &c. This plat and certificate is to be returned into the land office within twelve months at farthest. It may be returned immediately, and consequently may be returned to the land office before the expiration of the three months allowed to the surveyor for recording it in his book. This plat and certificate of survey is an authority to the register to issue a patent.

The surveyor undoubtedly neglects his duty, if he fails to record the plat and certificate of survey, and is punishable for this neglect; but the act furnishes no foundation for the opinion that the validity of the survey or of the patent is in any degree affected by it.

This point occurred in the case of *Taylor vs. Brown*, 2 Cranch, 234. That was a suit in chancery, brought by a junior patentee to establish an elder equitable title against the elder patent. Both claimed under old military surveys, made in virtue of military warrants, granted for services under the regal government, an entry of which with the surveyor was not required by law; consequently the survey was the foundation of a title to be asserted in a court of equity, against a title which was valid at law. The omission of any circumstance affecting his title was not, as in this case, cured by the patent.

In answer to the objection that the survey was not recorded within the time prescribed by the act of 1748, which contains a similar provision to that which is found in the present land law, the court said "this section is merely directory to the surveyor. It does not make the validity of the survey

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dependent on its being recorded, nor does it give the proprietor any right to control the conduct of the surveyor in this respect. His title, where it can commence without an entry, begins with the survey; and it would be unreasonable to deprive him of that title, by the subsequent neglect of an officer not appointed by himself, in not performing an act which the law does not pronounce necessary to his title, the performance of which he has not the means of coercing." We adhere to this opinion.

The circumstance that Fink, who is stated not to have resided at the time in Monongalia, nor to have been a deputy surveyor of that county, has also been considered as vitiating the patent.

The chief surveyor appoints deputies at his will, and no mode of appointment is prescribed. The survey made by his deputy is examined and adopted by himself, and is certified by himself to the register of the land office. He recognizes the actual surveyor as his deputy, in that particular transaction; and this, if it be unusual or irregular, cannot effect the grant. This point also appears to have been substantially decided in the case of *Taylor vs. Brown*. In that case Taylor's survey was made by Hancock Taylor, who was killed by Indians, so that he never returned the plat and certificate of survey to William Preston, the principal surveyor, as was required by law. His field notes, however, were brought to the principal surveyor, who made out a plat and certificate of survey from them. To the objection that the plat and certificate not having been returned to the office, the survey was not completed, the court answered, "this survey then is in law language made by William Preston. It is confirmed as a survey made by him. The law recognizes it as his survey. Assuredly then his certificate may authenticate it."

It cannot escape observation, that if these objections were properly overruled when urged in support of the legal title, against an equity dependent entirely on the survey; they can have no weight when urged against the validity of a patent which has been regularly issued in all the forms of law.

In Virginia, the patent is the completion of title, and estab-

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blishes the performance of every pre-requisite. No inquiry into the regularity of those preliminary measures which ought to precede it, is made in a trial at law. No case has shown that it may be impeached at law, unless it be for fraud; not legal and technical, but actual and positive, fraud in fact, committed by the person who obtained it; and even this is questioned.

In Hambledon et al. vs. Wells, reported in a note in 1 Hen. & Mumf. 307, the defendants in ejectment in the district court offered evidence to prove that the grant under which the lessor claimed, was defective in several pre-requisites to a patent. The court of appeals overruled these objections; but determined "that the district court erred in not permitting the appellants to give evidence that the appellee procured the plat on which the patent was obtained to be returned to the office, knowing that an actual survey had not been made." In this case the objectionable act was a fraud knowingly committed by the patentee himself. Even this case has been questioned; though not, as far as is known, expressly overruled.

In Witherington vs. McDonald, 1 Hen. & Mumf. 306, the defendant in ejectment offered evidence to show that the survey upon which the plaintiff's patent was founded was illegal; and also that the patent was obtained upon a certificate signed by Charles Lewis, as clerk of the land office, instead of being signed by the register or his deputy, as is required by law. The defendant excepted to the opinion of the court rejecting this testimony, and appealed to the court of appeals. The judgment was unanimously affirmed in that court. In the course of the trial, the case of Hambledon vs. Wells was mentioned by several of the judges with disapprobation; and it was said, that a single case decided by three judges against two, was not considered as conclusively settling the law.

The case of Hoofnagle vs. Anderson, 7 Wheat. 212, was a suit in chancery, brought to obtain a conveyance for a tract of land in the Virginia military reserve, in the state of Ohio, for which Anderson had obtained a patent. After its emanation, the plaintiff had located a military land warrant

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on the same land, issued for services performed by an officer in the Virginia line, on continental establishment. The services performed by the officer on whose warrant Anderson's patent had been issued, were in the state line; though the warrant was expressed, by mistake, to be for services in the continental line. This court said, "It is not doubted that a patent appropriates the land. Any defects in the preliminary steps which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all whose rights did not commence previous to its emanation."

After the rejection of this testimony, when offered to defeat the patent, it was offered for the purpose of disproving that the land contained in the patent was the same land claimed in the suit. The court rejected it when offered for this purpose also.

It is admitted to have been indispensably necessary to the plaintiffs' action, to show a valid title to the land in controversy; and that the defendants were at liberty to meet this testimony by any evidence tending in any degree to disprove this identity. But the defendants were not at liberty to offer evidence having no such tendency, but which might either effect a different purpose, or be wholly irrelevant. The question of its relevancy must be decided by the court; and any error in its judgment would be corrected by an appellate tribunal.

Now this court cannot perceive that the omission of the surveyor to record the survey, or the fact that the survey was made by a person not a regular deputy, had any tendency to prove that the land described in the patent was not the land for which the suit was instituted.

The third exception stated that the plaintiffs had offered in evidence a grant as set forth in the second bill of exceptions, &c. The defendants thereupon offered in evidence a certified copy of an act of the assembly of Virginia, establishing the county of Harrison in the words and figures following: "An act for dividing, &c." and a copy of the certificate of survey on which said grant issued, in the words and figures following: "December 13th 1784, &c." and proved

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that the land purported to be granted, and the land claimed as having been surveyed, lay in the bounds of the county of Harrison, established as aforesaid; and therefore the defendants moved to instruct the jury, that if they are satisfied, from the testimony, that the land lay in a different county from that in which the survey purports to have been made, that the grant was void; and that it was not competent for the plaintiffs to contradict the call for the county in the patent and survey; but the court then and there declared its opinion to the jury, that if even the facts aforesaid were true, they could not avail the defendants in the present action, and that the grant under these circumstances would not be void.

The warrant was entered for the land in controversy with the surveyor of Monongalia county on the 7th of April 1784. At the May session of that year the general assembly divided the county of Monongalia, and created a new county, to take effect in July, by the name of Harrison. The land on which Young's warrant was entered lay in the new county. The certificate of survey is dated in December 1784, and, in accordance with the entry, states the land to lay in Monongalia. The grant conforms with the certificate.

The land law of Virginia enacts that warrants shall be lodged with the surveyor of the county in which the lands lie, and that the party shall direct the location thereof specially and precisely. It also enacts, that "every chief surveyor shall proceed with all practicable dispatch to survey all lands entered for in his office." No provision is made for the division of a county between the entry and survey. The act establishing the county of Harrison, does not direct that the surveyor of the county of Monongalia shall furnish the surveyor of the new county with copies of the entries of lands lying in Harrison, and with the warrants on which they were made. In this state of things the survey was made under the authority of the surveyor of Monongalia, and the plat and certificate on which the patent afterwards issued were transmitted to the land office. It was not till the year 1788 that the legislature passed an act on this subject, which directs that when any county shall be thereafter divided, the

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surveyor of the new county shall be furnished with copies of the entries of all the surveyed lands lying in his county.

If in this uncertain state of the law, the surveyor of Monongalia county has surveyed an entry properly made in his office, for land which by a subsequent division of the county falls into Harrison, and has made his certificate as if the county still remained undivided; ought this error, if it be an error of the officer, to annul the patent, and deprive the offending patentee of his property?

The counsel for the plaintiffs in error has produced several cases to show that a mistake of this character in a royal grant, or any misinformation to the officers of the crown, will vitiate the instrument. We are not sure that grants which may be supposed to proceed from royal munificence, are to be placed precisely on the same footing with grants which are the completion of a contract of sale, every preliminary step in which is taken by officers appointed for the purpose by government, who act without the control of the purchaser. After making his location, he may show the land located, but has nothing to do with the authority of the surveyor, or the language in which he may make out his plat and certificate of survey. In this case there could have been no imposition attempted on the government by the purchaser. The mistake is accounted for, and there can be no imputation on the intrinsic fairness of the transaction. The misnomer of the county might take place, as has been suggested at the bar, in a case in which all the proceedings were perfectly regular. Had the survey been made the day before the law dividing the county of Monongalia took effect, the plat and certificate of the surveyor must have stated the land to be in Monongalia. The patent could not have issued until six months afterwards, and must have stated the lands to lie in Monongalia; although at the time of its emanation they would in fact lie in Harrison. To say in such a case that the misnomer of the county could avoid the patent, would shock every sense of justice and of law too much to be maintained. This misnomer of the county then must admit of explanation; and if explanation can be received, the patent is not absolutely void.

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The circumstances on which the motion to reject the grant was made, might be very proper for the consideration of the jury, on the question whether it comprehended the land in controversy ; but do not, we think, destroy its validity.

A vast deal of testimony, of which the court can take no notice, is crowded into this record. The bills of exceptions taken to the opinions of the district judge present the only points which we are at liberty to consider. In those opinions there is, we think, no error. The judgment is affirmed, with costs.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of West Virginia, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said district court in this cause be, and the same is hereby affirmed with costs.

ALEXANDER FINLAY AND JOHN MITCHELL, PLAINTIFFS IN ERROR
vs. WILLIAM KING'S LESSEE.

The testator was seized of a very large real and personal estate, in the states of Virginia, Kentucky, Ohio and Tennessee. After making, by his will, in addition to her dower, a very liberal provision for his wife, for her life, out of part of his real estate, and devising, in case of his having a child or children, the whole of his estate to such child or children, with the exception of the provision for his wife, and certain other bequests ; his will declares :

"In case of having no children, I then leave and bequeath all my real estate at the death of my wife, to William King, son of brother James King, on condition of his marrying a daughter of William Trigg's, and my niece Rachel his wife, lately Rachel Finlay ; in trust for the eldest son or issue of said marriage ; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King's, or of sister Elizabeth's, wife to John Mitchell, and to their issue."

The testator died without issue. He survived his father, and had brothers and sisters of the whole and half blood, who survived him, and also a sister of the whole blood, Elizabeth, the wife of John Mitchell, who died before him. William and Rachel Trigg never had a daughter, but had four sons. James King, the father of William King, the devisee, had only one daughter, who intermarried with Alexander M'Call. Elizabeth, the wife of John Mitchell, had two daughters, both of whom are married, one to William Heiskill, the other to Abraham B. Trigg.

By the Court. We have found no case in which a general devise in words, importing a present interest, in a will making no other disposition of the property, on a condition which may be performed at any time, have been construed, from the mere circumstance that the estate is given on condition, to require that the condition must be performed before the estate can vest. There are many cases in which the contrary principle has been decided. The condition on which the devise to William King depended, is a condition subsequent. [877]

It is certainly well settled, that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the particular clause, or of the whole will, shows that the act upon which the estate depends must be performed before the estate can vest, the condition of course is precedent ; and unless it is performed, the devisees can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent. [874]

It is a general rule, that a devise in words of the present time, as "I give to A. my lands in B.," imports, if no contrary intent appears, an immediate interest, which vests in the devisee on the death of the testator. It is also a general

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rule, that if an estate be given on a condition for the performance of which no time is limited, the devisee has his life for performance. The result of these two principles seems to be, that a devise to A., on condition that he shall marry B., if uncontrolled by other words, takes effect immediately, and the devisee performs the condition, if he marry B. at any time during his life. The condition is subsequent. [376]

The intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail; although in giving effect to it, some words should be rejected or so restrained in their application as to change their literal meaning in the particular instance. [377]

As the devise in the will to William King was on a condition subsequent, it may be construed so far as respects the time of taking possession, as if it had been unconditional. The condition opposes no obstacle to his immediate possession, if the intent of the testator shall require that construction. [378]

The introductory clause in the will states, "I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing my worldly estate in the manner following." These words are entitled to considerable influence in a question of doubtful intent, in a case where the whole property is given, and the question arises between the heir and devisee respecting the interest devised. The words of the particular clause also carry the whole estate from the heir, but they fix the death of the testator's wife as the time when the devisee shall be entitled to possession. They are "in case of having no children. I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King." The whole estate is devised to William King, but the possession of that part of it which is given to the wife or others for life, is postponed until her death. [379]

Quare. Did William King take an estate which, in the events that have happened, enures to his own benefit; or is he, in the existing state of things, to be considered a trustee for the heirs of the testator? This question cannot be decided in this cause; it belongs to a court of chancery, and will be determined when the heirs shall bring a bill to enforce the execution of the trust. [388]

ERROR to the district court of the United States for the western district of Virginia.

This was an ejectment brought in the district court of the western district of Virginia, and the question involved in the suit was the construction to be given to the will of William King, deceased, formerly of Washington county in Virginia.

The cause was argued in the court below, on the following case agreed; and the judgment of that court being in favour of the defendant in error, the plaintiffs brought the case into this court.

The following is the case agreed:

We agree that William King departed this life on the 8th

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day of October 1808, having first duly made and published his last will and testament, which was afterwards admitted to record in the county court of Washington county in Virginia, where he had resided, and is in the words and figures following:

" Meditating on the uncertainty of human life, I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing my worldly estate in the manner following, to wit :

" To my beloved wife Mary, in addition to her legal dower of all my estate, the dwelling house and other buildings on lot number ten in Abingdon, where I now reside, together with the garden, orchard, and that part of my fruit hill plantation south of the great road and lands adjacent to Abingdon, now rented to C. Finlay and Co., and at my father's decease, including those in his occupancy on the north side of the great road, for her natural life.

" I also will and declare, that in case my beloved wife Mary hath hereafter a child or children by me, that the said child or children is and are to be sole heirs of my whole estate, real and personal ; excepting one-third part of specified legacies and appropriations hereinafter mentioned ; which, in case of my having children, will reduce each legacy hereinafter mentioned to one-third part of the amount hereafter specified, and the disposition of the real estate, as hereafter mentioned in that case wholly void.

" In case of having no children, I then leave and bequeath all my real estate at the death of my wife to William King, son of brother James King, on condition of his marrying a daughter of William Trigg's and my niece Rachel his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage ; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg that will marry a child of my brother James King's or of sister Elizabeth's, wife to John Mitchell, and to their issue—and during the life time of my wife, it is my intention and request, that William Trigg, James King and her do carry on my business in copartnership, both saltworks and mer-

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chandizing, each equal shares, and that in consideration of the use of my capital they pay out of the same the following legacies:

"To John Mitchell, on condition of his assisting and carrying on business with them at the usual salary as formerly, viz. \$1,000 per year, for from two to five years, as they may wish his assistance. An additional sum of \$10,000, payable five years after my decease, and to each of his children upon coming of age \$1,000 more than the general legacy hereafter mentioned.

"To Connally Finlay a like sum of \$10,000, payable in five years.

"To my nieces Elizabeth Finlay and Elizabeth Mitchell (being called for my grandmother with whom I was brought up) \$10,000 in twelve months after marriage, provided they are then eighteen years of age; if not, at the age of eighteen; to each of my other nephews and nieces at the age of eighteen, that is children of my brother James, sisters Nancy and Elizabeth, \$1,000 each—to each of the children of my half-brother Samuel and half-sister Hannah \$300 each, as aforesaid; to my said sister Hannah, in two years after my decease \$1,000; and to my said half-brother Samuel, in case of personal application to the manager at Saltville or to my executors in Abingdon, on the 1st day of January annually during his life \$150; if not called for on said day to be void for that year, and receipt to be personally given.

"It is my wish and request that my wife, William Trigg, and James King, or any two of them that shall concur in carrying on the business, should either join all the young men that may reside with me and be assisting me in my decease, that are worthy; or furnish them with four or five thousand dollars worth of goods at a reasonable advance, on a credit of from three to five years, taking bonds with interest from one year after supply.

"In case my brother James should prefer continuing partnership with Charles S. Carson, (in place of closing the business of King, Carson and King, as soon as legal and convenient;) then my will is that William Trigg and my wife carry on the business, one-third of each for their own

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account, and the remaining third to be equally divided between the children of my brother James and sisters Nancy and Elizabeth.

"To my father, Thomas King, I leave during his life the houses he now resides in and occupies at Fruit hill, together with that part of my land in said tract north of the great road that he chooses to farm, with what fruit he may want from the orchard; the spring house being intended for a wash house with the appurtenances, subject to the direction of my beloved wife Mary, as also the orchard, except as aforesaid. I also leave and bequeath to my father the sum of two hundred dollars per annum during his life, and if, accidentally, fire should destroy his Fincastle house and buildings, a further sum of two hundred dollars per annum while his income from there would cease.

"I also leave and bequeath to the Abingdon academy the sum of \$10,000, payable to the trustees in the year 1816, or lands to that amount, to be vested in said academy with the interest or rents thereon for ever.

"Abingdon, Virginia, 3d of March 1806.

WILLIAM KING.

Test. Wm. D. NEELSON,

JNO. DOHERTY.

"I hereby appoint William Trigg of Abingdon and James King of Nashville executors of my last will and testament enclosed, written by my own hand and signed this 3d day of March 1806.

WILLIAM KING.

"The other wills of previous dates to said 3d of March 1806, being void.

WILLIAM KING."

We agree that William King, at the time of his death, was seised and possessed of seventy-six tracts of land in the said county of Washington, containing in the whole 19,473 acres of land, on one of which tracts is the saltworks, which have, since his death, been leased for years, at the annual rent of thirty thousand dollars; also of nineteen lots in the town of Abingdon in Washington county, nine of which pro-

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duced an annual rent of six hundred and sixty dollars; also of fourteen tracts of land in the county of Wythe, containing 3,494 $\frac{1}{2}$; also of eighteen tracts of land in the state of Tennessee, containing in the whole 10,880; also of shares in town lots in several of the towns in the said state of Tennessee. We also agree that the said William King survived his father in the will mentioned; that the said William King had brothers and sisters, to wit: James King, a brother of the whole blood; Nancy, a sister of the whole blood; the wife of Connally Finlay in the will mentioned; Samuel King, a brother of the half blood; Hannah, a sister of the half blood, the wife of John Allen; all of which brothers and sisters before named, survived the said William King; that another sister of the said William King, of the whole blood, died before him, and was named Elizabeth, the wife of John Mitchell, who is mentioned in the will.

We agree that William King, the lessor of the plaintiff, is the same William King, the son of James King, brother of the testator, mentioned by him in the will.

We further agree that William Trigg, in the will mentioned, departed this life on the 4th of August 1813, leaving Rachel Trigg, in the will mentioned, his widow, and four sons, the said Rachel having borne them to the said William Trigg, and not having borne any daughter to him the said William Trigg, at any time, which said sons are now living; that Mary, who was the wife of the said William King, is still living, aged forty-three years, and is now the wife of Francis Smith.

We further agree that William King, the lessor of the plaintiff, is married to Sarah Bekem; that James King had only one daughter, named Rachel Mary Eliza, who is now the wife of Alexander M'Call; and that Elizabeth, the wife of John Mitchell, had only two daughters, to wit: Elizabeth, who is now the wife of William Heiskill, and Polly, who is now the wife of Abraham B. Trigg.

We agree that William King the testator died seised and possessed of the house and lot in the declaration mentioned. We agree the lease entry and ouster in the declaration sup-

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posed; and that the defendants are in possession of the house and lot in the declaration mentioned.

If upon this state of facts, the lessor of the plaintiff ought to recover at this time, we agree that judgment shall be entered for him; and that if the court shall be of opinion that he ought not to recover until after the death of Mary, the wife of Francis Smith, or that he ought not at any time to recover, judgment shall be entered in favour of the defendants. We also agree that the property in controversy is worth more than two thousand dollars.

The case was argued for the plaintiff in error, by Mr Sheffy; and by Mr Smyth and Mr Webster, for the defendant, at the last term; and was held under advisement by the court.

Mr Sheffy proposed to consider the case under two general aspects.

1. Has the defendant in error any title to the estate in question, regarding the devise as personal to himself.
2. Has he any title, should the devise be considered as a trust.

It is contended, that he has no title. That no interest whatever vested in him, because the condition presented by the testator has not been performed. He has not married a daughter of William Trigg and Rachel his wife.

This has a condition precedent, without the performance of which no right could vest in the devisee.

If the will is construed literally, the words employed by the testator are as strong as they can be. He gives the estate "*on condition*" that the devisee shall marry a person not in being, but expected to come into existence, the offspring of his wife's brother and his own niece. He anticipates that such a marriage may not take place. In this event he directs that his whole real estate shall go to such other persons, among certain collateral relations, as shall give effect to the object he had in view.

But it is admitted that the question; whether the condition is precedent or subsequent, does not depend on any form of expression. It depends on the testator's intention.

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He has a right to bestow his estate on whom, and on what condition he pleases, so that he violates no established rule of law. To ascertain that intention, we must be governed by those rules of construction which have been established by a series of judicial decisions.

These decisions enable us to determine the general principles which give a character to conditions in contracts, and devises and bequests; either as conditions precedent or subsequent. So far as the present question is concerned, they establish, that where the testator requires the devisee to do an act which he regards as important to be accomplished; or where he prescribes a qualification which the devisee is to acquire; the performance of the act, and the attainment of the qualification, will be regarded as conditions precedent, unless a manifest intention to the contrary is apparent.

In the case before the court, the testator had no children. He had a strong desire to effect a union between the family of his wife and his own. In the disposition of his real estate, he contemplated the attainment of that object as paramount to all personal considerations. There is no reason to believe that his nephew William King was the object of his peculiar attachment. So far from it, he withdraws from him (though he bore his own name) even the smallest bounty, unless he should become instrumental in the accomplishment of his primary purpose. Looking to his marriage with a daughter of William Trigg and Rachel his wife, as an event which might never happen; he endeavoured to stimulate others, standing in the same relation to him, to effect the desired union of the two families. He did not dedicate his estate to gratify a particular personal attachment, or to promote individual interests; but to bring about an event which he strongly desired.

The case of *Bertie vs. Falkland*, 2 Vernon, 833, strongly supports the construction contended for by the plaintiff in error. There the testator devised an estate to Elizabeth Willoughby, an infant of ten years old "in case she married lord Guilford within three years from his death." The marriage did not take place, though there was no fault on the part of the devisee. The marriage was held to be a condition

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precedent. Lord chief justice Treby, in delivering the opinion of the court, says, "that the defendant Elizabeth's being willing and consenting, or endeavouring to bring about the marriage, could not be of any avail or moment in this case; for that the will was formed not on the endeavours or agreement of the parties to marry, *but on the event*. In Acherley vs. Vernon, P. W. Rep. 783, the case in Vernon is referred to by lord chief justice Wills, and considered by him as settling the law. The case before him involved the same principle. The question was whether the performance of an act required by the testator from his sister, was a condition precedent on which her title to a legacy depended, or whether the legacy vested at her brother's death. It was decided that the *act* being an object with the testator, and desired by him, was the consideration of the legacy, and therefore a condition precedent.

A great variety of authorities might be cited, all tending to establishing the same principle. It is sufficient to refer the court to the following: Creagh vs. Wilson, 2 Vernon, 572. Elton vs. Elton, 1 Ves. Sen. 4. Gillet vs. Wray, 1 P. Williams, 284. Graydon vs. Graydon, 2 Atkins, 16. Reynish vs. Martin, 3 Atkins, 333. Grascott vs. Warren, 12 Modern, 128. Harvey & Wife vs. Aston, 1 Atkins, 361. Randal vs. Payne, 1 Bron. Cha. Rep. 55, and 2 Atkins, 151. 2 Powell on Devises, 252. 2 Cruise, 20.

The intention of the testator, that nothing should vest until the condition should be performed, is further manifest, as the will postpones all right of the devisee of the real estate until the death of his wife. She was at the date of the will not more than twenty-five years of age, and he reasonably supposed that a marriage such as he wished to effect, would take place before her death. In the mean time, the legal estate descended to the heirs at law, who could hold it until the event contemplated by the testator should happen. Fearne on Remainder, 518, 516. 2 Fonb. Eq. 93.

It will probably be said that though the intent of the devisee is postponed in terms until the death of the testator's wife, yet that it ought to be construed into an immediate interest by implication. Such was the opinion of the court

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below. Courts have sometimes allowed implications when they are very apparent, in order to give effect to the intention of the testator. But they must be necessary, not probable implications; for the title of the heir at law being plain and obvious, no words in a will ought to be construed to defeat it, if they can have any other signification. *Cruise, title Devise*, 205.

But the devise over shows in the strongest light that the testator did not intend to part with the estate, unless the event which he sought to bring about should happen. He directs that "in case such marriage should not take place, then I leave and bequeath the said estate to any child of the said William and Rachel Trigg, that will marry a child of brother James King or of sister Elizabeth." It is immaterial whether the devise could take effect according to law, or not; the testator thought it could, and intended that the estate should pass to others in the event mentioned in his will. According to the pretensions of the defendant, it never could pass, though the event mentioned in the clause referred to should happen; and though it should be decided that the devise was within the legal limitation. For the ground on which he rests his claim (as is understood) is, that on the death of the testator he took a vested contingent fee, which would become absolute on the marriage with a daughter of William Trigg and Rachel his wife; that as there never was any such person, he could not perform the condition, and is therefore absolved from it, and holds the estate absolutely. If then a son of William Trigg and Rachel his wife, had intermarried with a daughter of James King or Elizabeth Mitchell, the defendant would have kept the estate against the express intention of the testator. This cannot be law, because it is contrary to all reason. It would be sporting with the right which the law guarantees to the citizen to dispose of his property to whom and on what condition he pleases, so that he violates no established rule of public policy.

But it is contended, that, if the estate vested in the defendant at the death of the testator, that all right in him became extinguished on the death of William Trigg. That event placed it beyond all doubt, that such a marriage as the

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testator wished to promote, could not take place. As to the defendant, therefore, his title ceased with the possibility of his becoming instrumental in uniting the two families.

But it will be contended, that, if the marriage of William King with a daughter of William and Rachel Trigg is a condition subsequent, then the estate is discharged from the condition; it being impossible to perform it; the correctness of the conclusion is not admitted.

If the testator's primary legal object was the union of the two families, and if he devised the estate to the defendant, on condition that he should become instrumental in effecting that object; it is immaterial whether the condition is precedent or subsequent, or whether the failure to accomplish the purpose desired, is owing to one cause or another. The question still recurs, did the testator intend that his nephew should have his whole estate, whether the marriage prescribed should take place or not, provided the failure was not attributable to him? Suppose the testator had declared that on his death his nephew should have his whole estate, in fee, on condition that he married a daughter of William and Rachel Trigg; but that whenever it was ascertained that such marriage could not take place, from any cause whatever, that all his right should cease, and that the estate should go to such person as is actually designated in the will. Could it be seriously argued that the impossibility of such a marriage, on the part of the defendant, would render the estate absolute in him, against the express intention of the testator? It is believed it could not: and yet this is the very case before the court, if the defendant had a vested interest at the death of the testator.

The argument that the defendant acquired an absolute estate, whenever it became impossible to perform the condition of the devise on his part, has no other support except the idea that the devise over was intended as a penalty on him for not doing what the testator desired, and that there can be no penalty when there is no fault. This is a perversion of the obvious meaning of the will. The testator was fully acquainted with all the circumstances; he knew that William and Rachel Trigg had no daughter, and consequently foresaw that it was

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possible that such a marriage *could* not take place. In this state of things, if he had intended that his nephew should have the estate, unless he was guilty of a fault in disobeying his wishes, would he not have restricted the devise even to the occurrence of such fault? Would he not have indicated that it was resistance or indifference to his views, that should take the estate from the party in fault, and place it at the disposal of others. The testator never thought of any such thing. He wished to effect *an object* dear to his heart. If that object was not effected, he cared not for the cause. Individual personal attachment had no share in the purpose. The *act* which united the two families was the meritorious and only consideration with him.

In this view of the subject, it is not material whether the condition *was*, at the date of the will, or afterwards *became* impossible. But if it was, it could be easily shown that this condition falls within neither of the classes mentioned in the books where performance is excused: It was not a condition impossible at the date of the will; on the contrary, it was *quite probable* that William Trigg and Rachel his wife, who were both very young, would have a daughter to whom the defendant could be united in matrimony. An impossible condition, which is considered as void, is of this character; that at the time it is required to be performed, nothing short of a miracle could accomplish its performance. It is laid down in 5 Viner's Abridgment, 111, that if the condition be that a person shall go to Rome in a day, it is impossible; but if the condition be that the Pope shall be at Westminster to-morrow, this is not an impossible condition, though the event is highly improbable. If a person should be required by a testator to qualify himself for and take holy orders by the time he should arrive at the age of twenty-five years, on the condition and consideration of a legacy, and that the interest should be paid to him in the mean time, (which would make it a vested legacy), would it be an excuse for the legatee to allege, that his intellect was unequal to the attainment of the necessary learning and the performance of the ecclesiastical functions, and that therefore it was an impossible condition? Most assuredly not.

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This is not a condition which *became* impossible after the death of the testator, the non-performance of which will be excused. Those conditions belong to cases where all the means to accomplish the testator's purpose are in his view and in being; but when subsequent events change the existing state of things so essentially as to render the performance impossible, for instance, if a devise be made on condition that the devisee consent to marry a particular person, and that person dies, the performance is rendered impossible by the happening of an event subsequently, which the testator never contemplated; and where the estate had previously vested it, will become absolute by the death of such person.

The leading case for the defendant, and which will be doubtless relied upon, is the case of *Thomas vs. Howell*, 4 Mod. Rep. 66. But that case is essentially different from the one before this court. There the testator devised to his daughter Jane an estate called Lawhorn, on condition that she, at or before the age of twenty-one years, "*do consent*" to marry Theophilus Thomas, who was the testator's nephew. Then he devised other estates to his two remaining daughters, and then follows this proviso: "And my will is, that in case my daughter Jane *shall refuse* to consent to marry my nephew Theophilus Thomas, at or before she shall be of the age of twenty-one years, or in the mean time shall marry another person, the devise shall be void." He proceeds to devise Lawhorn to his other daughters in succession, on the same condition; and then adds, "but in case neither of my said daughters marry my said nephew, then the estate given them in Lawhorn shall be void;" and devises the estate over to trustees.

Theophilus Thomas died at the age of twelve years; Jane never refused to marry him, and after his death, at the age of seventeen, married another person. She had entered on Lawhorn on the death of her father, and the question was, whether the estate was divested, the contemplated marriage never having taken effect.

Three judges to one were of opinion, that under the first proviso to divest the estate, Jane must have "*refused to con-*

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sent" to marry Theophilus Thomas; that what followed in the subsequent clause had reference to the same proviso, and ought not to be taken in a larger sense than the proviso itself; and upon this ground decided that the estate of Jane was absolute.

This case, instead of being an authority for the defendant, bears strongly against his pretensions. It shows that the court decided the case on the proviso, which made the refusal of Jane to "consent to marry" Theophilus Thomas the basis on which the devise over should take effect. And then arises an irresistible implication from the opinion of the court, that if the case had rested on the last clause, the estate would have gone to the trustees.

To establish that, in the case now before the court, the defendant acquired a title which can be defeated only by his voluntary default, would overthrow the principle well established in many cases of conditional devises and limitations. For example: A testator devises to A. an estate for the term of thirty years, and if at the end of the term he has a child living, to A. in fee; but if he should have no child living, then to B. It might not be the fault of A. that he had no child living at the end of the term, and yet it has never been questioned that B. would take the estate.

Again: suppose a case, which is very common. A testator devises an estate to A. and his heirs; but if A. shall die without issue living at his death, then to B. and his heirs; would the heir at law of A. be permitted to keep the estate on the ground that his ancestor had committed no fault, and that therefore the estate became absolute? Such a defence has never been offered.

It is contended, in the second place, that the defendant has no title if we regard the devise as a trust.

There is nothing in this case which authorizes the belief, that the testator had any *personal* predilection for the defendant. He mentions him as the son of his brother James King; but there is nothing peculiar in that, as he likewise refers, and with the same view, to all the other children of James King, and those of his sister Elizabeth. If we confine ourselves to the words employed, all idea of any beneficial in-

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terest being intended for William King, is excluded. He is to take the estate on condition that a certain marriage shall take effect; but it is "in trust for the eldest son or issue of the said marriage." If we regard the union of the two families as the great object which the testator sought to bring about; then those in whom should be united the blood of both, must have been the objects of his peculiar favour.

The testator probably thought that a person not in being could not take the estate, unless it was through the instrumentality of a trustee. He regarded his nephew merely as a conduit, through whom his bounty should flow to those whom he considered as pre-eminent; because they would inherit the blood of both families.

If the devise is to be considered as a trust, then the question arises whether any trust interest vested on the death of the testator, or whether it was to arise when the marriage took effect? No immediate interest is expressly devised; on the contrary, the words used are, "at the death of my wife." There is no reason to support an immediate interest by implication, because there was no necessity for it; as the beneficial interest could not vest, until those who were to enjoy it would come into existence. Besides, the statute of uses makes a devise to A. to the use of B. the same as a devise to B. so that this devise is in point of law to "the eldest son or issue of the marriage." The doctrine is well established that in such a case the legal title descends to the heir at law, and remains until the birth of the issue, when it vests in him. In this case, there being no possibility of any such issue, the title in the heirs at law is no longer in trust for the purposes of the will, but is absolute in themselves.

But admitting, for argument sake, that the trust vested on the death of the testator; it is urged, that whenever the possibility of a marriage between the testator's nephew and a daughter of William and Rachel Trigg became extinct, the trust terminated.

The purpose of such a trust is, that the trustee holds the estate for the *sole and exclusive* benefit of those who are to be beneficially interested; but if no such person shall be brought into existence, then the testator has not disposed of

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the estate : because he has never contemplated such a state of facts. No person ever doubted, that if the testator had given the estate to the eldest son of William King, when he should be born, and William King should never have a son, that the estate would go to the heirs at law of the testator. Whatever manifestations might appear to show that the testator did not intend to die intestate, such manifestations never have any other effect than to aid a court where the *donation* of an estate is in question, or when it is doubtful what property a general description includes. But to give to a naked trustee the absolute title to an estate, merely because the person for whom the beneficial interest was intended has not been born, and because the testator did not intend to die intestate, is not supported by reason or authority ; on the contrary, it is considered, that the title of the heir at law will always be supported, unless the devisee can show a clear intention against him.

The doctrine of resulting trusts is peculiarly applicable to this part of the case. It is well settled, that wherever the purposes of a trust have been satisfied, or cannot be executed, that the estate reverts to the heir at law. 3 P. Williams, 20, 252. 1 Saunders on Uses and Trusts, 164. 1 Brown's Ch. Cases, 508, 60, note. 4 Brown's Ch. Cases, 409.

Mr Smyth and Mr Webster, for the defendant in error.

In this case three questions are presented for consideration.

1. Whether is the condition on which the real estate is given to William King, precedent or subsequent ?

2. Supposing it to be subsequent, when does the estate vest in possession in William King ?

3. What is the nature of the estate when vested ?

1. We admit, that if a condition precedent becomes impossible, the estate will never arise; and equity will not relieve : But we contend that if a condition subsequent becomes impossible, the estate will not be defeated, or forfeited. 2 Bl. Com. 156, 157. 7 Co. Litt. 206, a, b. 2 Vern. 339. Powel on Contracts, 266. 2 Atk. 18. 2 P. Williams, 626, 627. Powel on Devises, 262.

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The same words make a condition precedent or subsequent, according to the intent of the person who creates it. Willes, 156. 2 Bos. & Pul. 295. 1 Durnf. and East, 645. 2 Caines, 352. Powel on Devises, 183. Cases T. T. 166.

Whether the condition is precedent or subsequent, depends on the order of time in which the intent of the testator requires the performance. Willes, 157. 2 Bos. & Pul. 297. Justice Heath said, "The question always is, whether the thing is to happen before or after the estate is to vest? If before, the condition is precedent; if after, it is subsequent."

In the case before the court, the intention of the testator is clear, that William King should have the whole estate on the death of Mrs King. Mrs King might have died within a year after the death of the testator; yet the daughter of William Trigg and Rachel his wife, whom William King was required to marry, might have been born twenty years afterwards, and the marriage might have taken place at the end of forty years more. It could not have happened in less than thirteen years, and might have happened more than sixty years after the death of the testator. Clearly, the testator intended, that under those circumstances, the marriage might be subsequent to the vesting of the estate.

Unless the intent of the testator required that the devisee should, before the death of Mrs King, marry a female who was unborn at the time he made his will, and at the time of his death, this cannot be a condition precedent. Why should it have made any difference to the testator, whether the marriage happened before or after the death of Mrs King?

A condition is precedent or subsequent, as the act is to be done before or after the estate vests. This act, the marriage, was not necessarily to be done before the whole estate should vest in possession. A condition which might be complied with sixty years after the time prescribed for vesting the whole estate in possession, must be a subsequent condition. If the act may as well be done after as before the vesting of the estate, the condition is subsequent. All conditions in wills are either precedent or subsequent. A condition which may be performed either before or after, is not a precedent condition, and therefore is a condition subsequent.

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The testator says, " I then leave all my real estate, at the death of my wife, to William King, son of brother James King, on condition of his marrying," &c. The whole estate must vest in possession at the death of Mrs King. But William King, who was three years old when the will was made, had his whole life to perform the condition. A marriage after the death of Mrs King would be a fulfilment of the condition, as well as a marriage before her death. Therefore it is a condition subsequent; and being impossible, the estate will not be defeated or forfeited. 2 Atk. 18. Cases T. T. 164, 166. 2 P. Wms, 626. Pow. Dev. 257, 258. 1 Salk. 170. 4 Mod. 68. Rice vs. Aislabie, 3 Madd. 256, 260.

There are some cases reported which, at first view, may seem adverse to us; but which, on examination, will be found to differ essentially from our case. In the case of Bertie vs. Falkland^(a), the condition was adjudged to be precedent. There was a devise to trustees for three years, and if there was a marriage in three years the estate was to vest. There the marriage was obviously a condition precedent; for it was to take effect in three years, and the estate, being in trustees, was not to vest until the termination of the three years. So where there was a settlement in trust, that if A. marries B. after the age of sixteen, and they have issue male, the estate shall be to A. and B. for themselves; the condition is precedent: for the estate is expressly given to trustees, until the marriage and the birth of issue. 2 Vern. 333. Com. Dig. Condition, B. 1, pl. 10.

2. When does the estate vest in possession of William King, the lessor of the defendant in error?

We contend, that all the estate of William King, the testator, is devised by the will. If all is devised by the will, the right of possession of the real estate, from the death of the testator to the death of Mrs King, is devised. It is not devised to Mrs King by implication. The real estate is devised to William King; therefore he takes the right of pos-

(a) A note in a late edition of Freeman's Reports, p 86, says, this decision was reversed in the house of lords.

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session during the life of Mrs King, unless it is devised to some other person.

We contend that, as to all the lands of William King the testator; except the dower of Mrs King, the saltworks, and those lands devised to Mrs King, to Thomas King, and to the Academy; the estate passed to William King the devisee, immediately on the testator's death.

Did the testator intend his hundred tracts of land, and thirty or forty town lots, should descend to his heir until the death of his wife? We insist that the testator did not intend that his lands should descend to his heir for a moment. The heir shall not take, where, from the will, the intention of the testator that he shall not take appears. The limitation over, although supposed not to be a good one, shows the determination of the testator to defeat the claim of his heir. 1 Dall. 227.

If the estate does not pass immediately to William King, there must be either a life estate by implication, or a descent to the heir, during the life time of Mrs King. As Mrs King has dower devised to her in the whole of the lands, and a life estate in a part of them, she cannot also take a life estate in the residue by implication. She cannot claim a life estate in parts, and also in the whole. Had William King, the devisee, been the heir, and had there been no devise to Mrs King, this devise to him, "at the death of my wife," would have given to her an estate for life, by implication. 4 Bac. Ab. 288. 2 Vern. 572, 723.

The father of the testator was, at the time of making his will, his heir presumptive. To him is devised, for life, the use of a cottage, and perhaps twenty acres of land, as many apples from the orchard as he could eat, and an annuity of \$200. After his death, this piece of land was to go to Mrs King for her life. This devise shows that the defendant did not intend that his presumptive heir should take one hundred plantations, during the life of Mrs King. The testator manifestly expected his wife to outlive his father, and has spoken as if that was beyond a doubt.

The testator intended to dispose of the whole of his real

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estate. He speaks of "the disposition of the real estate;" and uses the expressions, "my worldly estate," "all my estate," "my whole estate," "all my real estate." Did the testator intend to die intestate as to his one hundred plantations, and thirty or forty lots, during the life of Mrs King? He did not intend to die intestate as to any part of his estate. He makes his will, "leaving and bequeathing my worldly estate, in the manner following." If after the use of such words, a part of the testator's property was clearly omitted, it is admitted that such part would not pass by the will; but if property is given by the will, these words will signify that all the testator's interest therein is given. Ca. T. T. 157, 160, 161. 3 P. Wms, 395, 297, 298. 1 Wils. 333. 1 Vesey, 226. 1 Wash. 97, 107. 2 Binney, 17, 33. 1 Call, 182. 1 Munf. 543, 545.

In the case of *Ibbetson vs. Beckwith*, lord chancellor Talbot said, "I am of opinion that these words (worldly estate) prove him (the testator) to have had his whole estate in his view, at that time. Indeed he might have made but a partial disposition; but if the will be general, and that taking his words in one sense will make the will to be a complete disposition of the whole, whereas the taking them in another will create a chasm, they shall be taken in that sense which is most likely to be agreeable to his intent of disposing of his whole estate."

"All my real estate," is descriptive of the duration as well as of the extent of the estate. Therefore it includes the right to possession, before the death of Mrs King, as well as after, in those lands not devised to her, or to others during her life. Salk. 236. 2 P. Wms, 524. 1 Vesey, 228.

"Leaving and bequeathing my worldly estate," means the same thing as if the testator had said. "I intend to give by this will every thing I have in the world." 3 Wils. 143. The testator having said this, devised the most valuable portion of his estate to his wife, and to others, for her life. Then he devised all his real estate to his nephew, at the death of his wife. To make this agree with his declaration, that he intended to give by the will all he had in the world, this devise must be so construed, that the devisee will take immediately, on the testator's decease, that part of the estate

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which has not been devised to another, and that he shall take, on the death of Mrs King, that portion of the estate which had been devised to her, and to others, for her life. He shall take it *all* then, because he cannot take it all sooner.

Taken in connection with the introductory words, "all my estate at the death of my wife," it is a devise of the whole duration of the estate after the death of the testator; but it may by implication give it to Mrs King, during her life. Now if it has been shown that the estate is not devised to Mrs King by implication, as it is devised, it must go to William King, the specific devisee.

"All my estate, at the death of my wife," carries the whole, as well before as after her death: but if there was no devise to the wife, those words would divide the duration, the wife taking during her life, and the specific devisee afterwards. When the wife cannot take, these words must be otherwise satisfied. And if the specific devisee can take only a part immediately, and the residue at the death of the wife, so that then he will take all, they are satisfied.

The intention of the testator is the polar star in construing wills. 4 Mod. 68. 1 Wash. 102. 1 Munf. 537, 547. 2 S. C. Rep. 32. The court will execute the intention of the testator, as far as they can. They will transpose the words of a will to effectuate the intent of the testator. Let the word "all" be transposed, and the clause made to read, "I then leave and bequeath my real estate, all, at the death of my wife, to William King." 1 Call, 132.

Nothing could be further from the intention of the testator than the distribution of his estate, either to his brothers and sisters, or to his nephews and nieces. He intended that all his real estate should vest in one man, his eldest nephew, of his own name, the son of his only brother, of the full blood, and in the eldest son or issue of that nephew. The distribution would include Samuel King, or his children, to which half brother the testator grudgingly gave an annuity of \$150.

The question, when shall the estate vest in possession, is to be decided from the intention of the testator, as gather-

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ed from the whole will. 1 Doug. 342. The testator intended that his heir or heirs should not have his plantations. To take the estate from the heir, during the life of Mrs King, requires a necessary implication; and such an implication is here. 4 Bac. Abr. 282. 2 Vent. 571. 1 Dall. 227. The devise to Thomas King, the presumptive heir at the time of making the will, of a house and a few acres of land for life, remainder to Mrs King during her life, is inconsistent with his taking the large real estate of William King, and a necessary implication that he is not to take it, during Mrs King's life.

The counsel on the other side has said in argument, that Thomas King, the father of the testator, was an alien. That is going out of the record, by which it appears that the testator considered his father capable to take a freehold, and that he was in fact a proprietor of real estate. It has never been shown that Thomas King was an alien; and, from information, it is probable that he never was an alien in the United States.

Either the heir or the devisee must take; for the testator cannot put the freehold in abeyance. 1 Doug. 231.

If the condition of marriage is subsequent, which we deem proven, there is no reason for postponing the commencement of the estate of William King the devisee, in possession, of the real estate not devised for the life of Mrs King. If the estate is given on a condition subsequent, why may not the estate, except what is devised to Mrs King and others, vest in possession immediately on the testator's death? To what end suspend it, when it is not to wait for the performance of the condition?

These words, "at the death of my wife," were inserted in consideration of the devise of the use of the saltworks during her life, the devise of dower, and the devise of certain portions of the real estate, during her life. These words have their effect; because a large part of the estate, far the most valuable, cannot, consistently with other clauses in the will, come to the possession of the devisee, William King, until Mrs King's death.

Suppose that a testator had made his will thus: to A. my

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father, who is seventy years old, during his life, one-three-hundredth part of my real estate; to B. my wife, who is twenty years old, during her life, one half of my real estate, including the part devised to my father, after his death; to C. my nephew, the whole of my real estate at the death of my wife; the testator dies, the father, who is heir, surviving. Would a court give to A. the father, and his heirs, half the real estate, during the life of B. the widow, when the testator clearly intended and expressed that A. should have only one three-hundredth part for his own life? Certainly they would not. In such a case, the words, "at the death of my wife," would be applicable to the moiety devised to her for life. The death of the father before the testator, in this case, cannot change the meaning of the will.

All the real estate could not vest in possession of William King, the devisee, at the death of the testator: but all is devised to him: therefore the words, "at the death of my wife," are used; as then, and not till then, all might vest in possession.

Should the testator be regarded as having died intestate, as to his lands not devised to Mrs King, until her decease, they would have descended to his brothers and sisters, his father having died before him; and it is apparent that he did not intend that those brothers and sisters should take his real estate, during the life of Mrs King.

To James King he gives the use of one third part of the saltworks during the life of Mrs King, say \$10,000 annually; to Samuel King, an annuity of \$150; and to Hannah Allen, a legacy of \$1000; thus giving to James King sixty-six times as much as to Samuel King, and more than two hundred times as much as to Hannah Allen: but if his plantations are distributed during the life of Mrs King, then Samuel King and Hannah Allen will have a part equal to that of James King, although they stood so unequally in the affections of the testator as objects of his bounty. It seems manifest that he did not intend that his great estate in lands should pass to, and be distributed among his brothers and sisters, during the life of Mrs King.

Unless the will is construed to give to William King, im-

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mediately, the lands, other than those devised during Mrs King's life, the marriage intended might have taken place within fifteen years from the testator's death, and the issue of the favourite nephew, the desired family of Kings, might have been without a maintenance for the period of forty years; as Mrs King, who was twenty-four years old at the death of the testator, might have so long lived; while one hundred plantations and thirty or forty town lots would be in the possession of the heirs. This cannot have been the intention of the testator. 2 P. Williams, 627.

It may be proper to notice the very imperfect manner in which the testator expressed himself in this will, for want of legal knowledge. He devises the use of his capital; that has been construed to be a bequest of his capital. He requests that his executors and his wife will carry on his salt-works business in copartnership; that has been construed a devise of the saltworks. He devises \$10,000 to two of his nieces; that has been construed a devise of \$10,000 to each of them. To give effect to the intention of this testator, requires the liberal aid of the courts.

3. What is the nature of the estate of William King, the devisee, when vested?

If the condition is subsequent, the devisee has his life time to perform it, before he forfeits; even where performance is impossible. And if it becomes impossible, without his default, or never becomes possible, we contend that he will never forfeit. Had Mrs King died within a year after the death of the testator, the whole real estate would have vested in William King, in possession, although the daughter of William Trigg was unborn. The devisee would have his life time to perform the condition, even if William Trigg had ten daughters. Even if William King had stood by and seen those ten daughters all married, he would have time to perform; for he might marry one of them when a widow. Should he even marry another woman, he would still have time to perform; for he might when a widower perform the condition.

An impossible condition is the same as none. It is void, and there can be no breach. It is impossible that there

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should be such a marriage as the testator desired: therefore the devisee takes and holds as if there was marriage; or rather, as if there was no condition, for the condition is void. The counsel on the other side contended that this was not an impossible condition; for that it was probable the marriage might be had. The law says nothing of probable conditions. And it is asked, what is more impossible than to marry a person who never came, and never can come, into existence?

If it is impossible to do a thing, no one can be under any obligation to do it. The condition was not possible when made, and never became possible; and being subsequent, the estate is absolute. If the condition had been possible when the will was made, and afterwards became impossible by the act of God, without the default of the devisee, the estate would also be absolute. 2 P. Wms, 628. Com. Dig. Condition, D. 1, pl. 4. Pow. Con. 265.

Had a daughter been born to William Trigg, and had the marriage taken place, William King would have taken the profits, without having issue. There is no devise over, in the event of not having issue. The application of the profits to the use of such issue, would have been another impossible condition; therefore he would keep the profits, and hold the legal estate discharged from the trust, the performance of which was impossible.

If the condition is subsequent and impossible, and the application of the profits, as directed, also impossible; then the estate must be held discharged of the condition, and exonerated from a trust which cannot be performed. When the impossible condition is stricken out of the will, the trust to arise thereon goes out with it. The devise is to William King, subject to an impossible condition, an impossible executory trust, and a void limitation; yet the legal estate remains in him. He is devisee in fee, on a void condition. The whole condition being void, every part of it is void.

We contend that William King, the devisee, takes beneficially, and keeps the profits. The devise is unquestionably a beneficial one; for, in one event, that of marriage and having no issue, the estate is not devised over, and the profits

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would belong to the devisee. Why should the profits be taken from the devisee? There are none who seem better entitled under the will. This is the only devise made by the testator to his favourite nephew, the eldest son of his only brother of the full blood, and the heir of his name. The testator was obviously attached to the principle of primogeniture, and paid great regard to names. To two of his nieces he gave \$10,000 each, because they were named after his grandmother. Did he mean to give nothing to the nephew who bore his own name? He cannot have intended that his favourite nephew should be a mere trustee for his, the testator's heirs; in any event, entitled only to commissions on his receipts. Did he mean to devise to his favourite nephew trouble, and nothing more, on condition that he would marry the daughter of his favourite brother-in-law and niece?

A consideration was required of him: marriage. He is therefore entitled to the estate on the condition imposed, if performance shall be possible, and on no other condition; to take the profits for his children if such there be, and if not, for his own use. This consideration shows that, had the marriage taken effect, the devisee could not have been regarded as a mere trustee. Here is also the consideration of nearness of blood, which is often decisive of the question, whether a devisee takes beneficially, or as a mere trustee. See *Loyd vs. Spillet*, 2 Atk. 150, and *Hobart vs. The Countess of Suffolk*, 2 Vern. 645.

Will the estate determine on the death of William King the devisee, in consequence of his not performing the condition?

The words of the devise convey a fee simple; and he takes a fee simple, if he takes at all. What would be the construction of the will, should the void clause be stricken out? That it conveys an absolute estate in fee simple. Strike out the void clause, and the devise will read, "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King."

The failure of issue is not made a condition on which the

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estate shall pass over. Consequently the devisee would take the estate and profits, after marriage, without issue. And we contend, that as soon as the estate vests in possession, he will take the profits without marriage, the condition being subsequent and impossible. It is a devise to him in fee simple; and there are none to whom the profits are directed to be paid. A beneficial devise to him was intended, and there is no implication in favour of the heirs.

The important question is, "does the legal estate pass by the devise?" If so, there is no trust for the heirs. The heir is entitled to the real estate not given to another: but here all the real estate is given from the heir. The estate is devised over, on failure to perform the condition. A question may yet arise, whether that devise over is good. Whether that devise is good or not, we contend that we have a right to recover. The heir cannot prevail, unless it is decided that the devise to William King, and the devise over, are both void.

There is a class of cases which have some analogy to that before the court; although they are essentially different from it. The cases referred to are those wherein a question has arisen between the heir and executor, the heir and next of kin, or the heir and devisee; whether there is, or is not a resulting trust for the heir.

Where lands are devised to be sold for payment of debts and legacies, or in trust for the payment of debts and legacies, and the devisee or executor is a stranger, or has a legacy, and there is a residue; there is a resulting trust for the heir, especially if there is nothing given to him by the will. In this case the devisee is no stranger, he has no legacy, and there is no residue. 1 P. Wms, 309. 2 Atk. 150. 2 Vern. 644. 1 Meriv. 301.

But if it appears from the will that a benefit was designed for the executor or devisee, being a relation, and especially where the heir has some other benefit from the will; there will be no resulting trust for the heir, although there is a residue. In this case the devisee is a relation: a benefit is intended him, and the heirs are provided for by the will. See *Rodgers vs. Rodgers*, 3 P. Wms, 193. North vs.

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Crompton, 1 Cha. Ca. 196. Coningham vs. Melish, 1 Eq. Ca. Abr. 273, or Prec. Cha. 31. Malabar vs. Malabar, Ca. T. T. 78, in which case the devise was in trust, yet there was no resulting trust for the heir. Hill vs. The Bishop of London, 1 Atk. 618, 619, 620. Smith vs. King, 16 East, 282. Kennell vs. Abbot, 4 Ves. 6.

The rule, that an heir, taking a benefit by the will, cannot have a resulting trust, would exclude the heirs of William King the testator; as not only the presumptive heir at the time of making the will, but also those who were heirs at the time of his decease; every one of them take benefits by the will.

Wherever there is a consideration, there can be no resulting trust. 7 Bac. Abr. 143. Here marriage was required; and the devisee might have waited twenty years to perform the condition. Had a daughter been born to William Trigg, when William King was twenty-five years of age, and had he waited for her fifteen years, and she had died, surely his claim would have been strong; yet it would have been no better than it now is; because the words and meaning of the will would have been the same. If in that case the claim of the devisee would have been good, it is good in this case.

This case is not like that of a devise upon trust to pay debts and legacies (1 Meriv. 301), for in such a case, there may be a residue; but here the whole estate is devised away, upon condition, and, upon failure of that condition, devised over. Thus no residue is left for the heir to claim. The trust is of equal extent in point of duration with the legal estate. No part of the trust remains undisposed of. It would be difficult to express more clearly an intention that the heir shall not take. The estate is devised in fee on condition, and, on failure to perform that condition, devised over.

But if the plaintiff is a mere trustee, he has a right to recover in ejectment. 2 Doug. 722. 5 East, 138. 1 Schoales & Lefroy, 67.

A mere trustee may recover against him who claims the

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benefit of the trust, where the right is not clear. 4 Bos. & Pull. 171.

It is hoped that the opinion of the court will elucidate and ascertain the rights of all parties claiming the real estate of the testator; as they know not certainly to what they are entitled.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

This is a writ of error brought to a judgment rendered in an ejectment by the court of the United States, for the western district of Virginia. The judgment was pronounced on a case agreed. Three questions have been made at the bar:

1. Is the condition on which the testator has devised his real estate in trust to William King, a condition precedent or subsequent?

2. If subsequent, at what time does the estate vest in possession?

3. What is the nature of the estate, when vested?

1. Is the condition precedent or subsequent?

The words of the will are, "In case of having no children, I then leave and bequeath all my real estate at the death of my wife to William King, son of brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage, and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of William and Rachel Trigg that will marry a child of my brother James King's, or of sister Elizabeth's, wife of John Mitchel, and to their issue."

It was admitted in argument, and is certainly well settled (a), that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently; and the question is always a question of intention. If the language of the particular clause, or of the whole will,

(a) Willis, 156. 2 Bos. & Pul. 295. 1 D. & E. 645.

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shows that the act on which the state depends, must be performed before the estate can vest, the condition is of course precedent; and unless it be performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent.

In the case under consideration, the testator does not in terms give his real estate to William King on his marrying the daughter of William and Rachel Trigg, but at the death of his, the testator's wife, on condition of his marrying a daughter of William and Rachel Trigg. Whatever doubt may be entertained respecting the lands not given to the wife for life, the testator has expressed clearly his intention, that the lands encumbered with his wife's life estate should come to the possession of William King at her death. He gives the estate at that time, without requiring that the condition annexed to it should be previously performed. The estate then vests in possession, whether the condition on which it was to depend be or be not performed. It cannot be supposed to have been his intention that the devisee should take possession under this devise, before the interest vested in him. The interest, therefore, must have vested previously, or at the time. The language of the testator does not indicate the intention that the marriage must take place during the life of his wife; nor do the circumstances of the parties justify us in imputing such an intention to him. The time of her death was uncertain, and it might follow close upon his own. The contemplated marriage could not possibly take place until the lapse of many years, because one of the parties had not come into existence. William and Rachel Trigg had not at the time, and never have had, a daughter. The testator therefore has fixed a time when the estate is to vest, which might probably precede the happening of the event on which its continuance is to depend. This is clearly a condition subsequent, as to those lands in which an estate for life is given to the wife of the testator.

Does any reason exist which will authorise a distinction between those lands in which the wife took a life estate, and

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those of which no other present disposition is made in the will?

The testator makes no distinction. In one clause he gives "his whole real estate at the death of his wife to William King, son of his brother James King, on condition," &c. If, as the language would seem to indicate, the devisee was entitled to possession of the whole property at the same time, that is, at the death of the testator's wife, it would follow that the condition on which the whole depends is a condition subsequent. If the devise should be construed, as the defendant in error contends, to give William King a right to the immediate possession of that part of the estate of which no other disposition is made, does this circumstance furnish any reason for the opinion, that this part of the estate depends on a condition precedent? We think not. The will might then be construed as if it were expressed thus: "in case of having no children, I then leave and bequeath all my real estate, subject to the devise to my wife for life, to William King, son of my brother James King, on condition of his marrying," &c. This is the most unfavourable manner for the defendant in error in which the question can be presented. It waives the benefit derived from fixing a time for the possession of a considerable part of the estate, which might very probably precede the event on which its continuance is made to depend. Had even this been the language of the will, the estate in the lands would, we think, depend on a condition subsequent.

It is a general rule, that a devise in words of the present time, as I give to A. my lands in B. imports, if no contrary intent appears, an immediate interest which vests in the devisee on the death of the testator. It is also a general rule, that if an estate be given on a condition, for the performance of which no time is limited, the devisee has his life for performance. The result of those two principles seems to be, that a devise to A., on condition that he shall marry B., if uncontrolled by other words, takes effect immediately; and the devisee performs the condition, if he marry B. at any time during his life. The condition is subsequent. We have found no case in which a general devise

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in words, importing a present interest in a will, making no other disposition of the property, on a condition which may be performed at any time, has been construed from the mere circumstance that the estate is given on condition, to require that the condition must be performed before the estate can vest. There are many cases in which the contrary principle has been decided(a). We think then that the condition on which the devise to William King depended, was a condition subsequent.

.2. The second point is one of more difficulty. Does that part of the real estate which is not otherwise expressly disposed of, vest in William King immediately, or at the death of the testator's wife?

The words are, "in case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King, on condition," &c.

These words certainly import that the whole estate should vest in possession at the same time, and mark with precision when that time shall be. This express provision can be controlled only by a strong and manifest intent, to be collected from the whole will. But the intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail; although in giving effect to it some words should be rejected, or so restrained in their application, as materially to change the literal meaning of the particular sentence.

The counsel for the defendant in error insists that the intent to give the real estate not otherwise disposed of immediately to William King, is apparent on the face of the will, and must control the construction of the clause under consideration. This proposition has been so fully discussed at the bar, that the court need only restate the principles which have been already advanced in the argument.

(a) 2 Atk. 18. Cases T. T. 164, 166. 2 P. Wms, 626. 2 Pow. on Dev. 257.
1 Salk. 170. 4 Mod. 68. 2 Salk. 570.

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Of the immense estate left by the testator, about one half, including her dower, was given to his wife and others for her life. The residue was given to William King immediately, on the trust mentioned in the will, or given by implication to the testator's wife, or was permitted to descend to his heir at law.

As the devise to William King was on a condition subsequent, it may be construed, so far as respects the time of taking possession, as if it had been conditional. The condition opposes no obstacle to his immediate possession, if the intent of the testator shall require that construction.

We will first consider the supposed implied devise to the wife.

As William King was not the heir of the testator, a devise to him at her death does not necessarily imply an estate in her during life; and the will itself furnishes strong reason for rejecting this construction. His wife, as might well be supposed, was first in his mind, and was kept in mind throughout the will. He notices her legal right to dower, so as to avoid a possible implication that what he gave her was in lieu of dower, and to secure her from the necessity of relinquishing all interest in the estate bequeathed to her as preliminary to claiming her dower. She claims her dower under the will, as she does the other large estate bequeathed to her. It is not probable that a person who was careful to notice even that to which she would have been entitled under the law, would have omitted totally a very large property which she could claim only under the will. He even notices the remainder of a small property in the occupancy of his father; and mentions his wife in many other parts of his will, in a manner to add to the improbability of his having totally omitted her name, when a very large benefit was intended. It seems to us to be contrary to reason and to the ordinary rules of construction to intend, that a large estate is given by an unnecessary implication to a wife who takes her dower in the whole, and also a large part by express words. We think it very clear that there is no *implicative* devise to the wife.

Does the property in question descend to the heir at law

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during the life of the wife? Was it the purpose of the testator to die intestate with respect to it until her death?

We cannot think that such was his purpose; or that his will authorizes the court to say so.

The introductory clause indicates an intention to dispose of all his estate. He says, "I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing my worldly estate in the manner following." These words are entitled to considerable influence in a question of doubtful intent, in a case where the property is given, and the question arises between the heir and devisee respecting the interest devised. The words of the particular clause also carry the whole estate from the heir, but they fix the death of the testator's wife as the time when the devisee shall be entitled to possession. They are, "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King," &c.

It is admitted that if this clause stood alone, unexplained by other parts of the will, the real estate, not otherwise disposed of, would descend to the heir. The law gives to him whatever is not given to others. But if other provisions in the will show an intent that the legal title of the heir should not prevail, those other provisions must be respected in construing the instrument(^a).

When the will was made, the testator's father was alive, and was consequently to be considered as his heir. He was an old man; and the provision made for him seems to have contemplated only a comfortable supply for the wants of one who had grown up and lived in simple unexpensive habits. The testator gives him for life the houses in which he then resided, with so much land as he might choose to farm, what fruit he might want, and the spring house, subject to the direction of his wife; also the sum of \$200 per annum during his life; and, if fire should destroy his Fincastle house, a

(a) Cases, T. T. 157. 1 Coke, 1. 8 P. Wms, 295. 1 Wils. 388. 1 Ves. 225. 1 Wash. 97, 107. 1 Call. 182. 1 Munf. 143, 145.

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farther sum of \$220 per annum, while his income from that source should be suspended. This property is given to his wife for life on the death of his father. These moderate provisions for the heir, contemplating only the ease and comfortable supply of the wants of an old man, comport very little with the idea of leaving an immense estate, consisting among other articles of numerous tracts of land, remote from each other, most probably of very difficult management, to descend to him. It is not probable that this estate would be left to descend to him for the life of Mrs King. Her surviving him was probable, and the testator expected she would survive him. The lands devised to him are given to her for life.

The father, who was the presumptive heir when the will was made, died during the life of the testator. This event is not supposed to affect the construction of the will. But were it otherwise; were it supposed that he might look forward to that event, and contemplate his brothers and sisters as his probable heirs; he will furnishes arguments of great weight in support of the opinion, that he did not intend them to take any thing not expressly devised to them. The heirs of the testator, at the time of his death, were James King, a brother of the whole blood, Nancy Finlay, a sister of the whole blood, Elizabeth and Polly, the daughters of Elizabeth Mitchel, a sister of the whole blood, Samuel King, a brother of the half blood, and Hannah Allen, a sister of the half blood. Each of these persons is noticed in the will. For some of them, an ample provision is made. To others, less favour is shown. The legacies to his brother and sister of the half blood are inconsiderable; while his bequests to those of the whole blood are large. No one of them is omitted. The circumstances that his mind was clearly directed to each, and that he has carefully measured out his bounty to each, discriminating between them so as to show great inequality of affection, operate powerfully against the opinion, that he intended to leave a very large property to descend upon them by the silent operation of law.

The whole will proves the primary intention of the testator

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to have been to keep his immense real estate together, and to bestow this splendid gift on some individual who should proceed from the union of his own family with that of his wife. In case of having no children, he gives all his real estate, at the death of his wife, to William, the son of his brother James, on condition of his marrying a daughter of William Trigg and Rachel his wife, in trust for the eldest son or issue of said marriage. If such marriage should not take place, he gives said estate to any child, giving preference to age, of William and Rachel Trigg, who should marry a child of his brother James, or of his sister Elizabeth. William Trigg was the brother of his wife. His primary object then is the issue of a marriage between his nephew William King and a daughter of William Trigg, by his then wife, the niece of the testator. His second object was the issue of any marriage which might take place between any child of William and Rachel Trigg, and any child of his brother James or of his sister Elizabeth. That both these objects have been defeated by the course of subsequent events, does not change the construction of the will. The testator undoubtedly expected the one or the other of them to take place, and his intention respecting the immediate interest of the devisee or the descent to the heir, is the same as if a daughter had afterwards been born to William and Rachel Trigg, who had intermarried with William King. The will therefore is to be construed in that respect, as if the contemplated marriage had been actually consummated. It was not very probable, at the date of the will, that the devisee of this immense fortune might come into existence in less than twenty years, nor that the wife might live fifty years. In the mean time no provision whatever is made for him. To what purpose should the profits of the estate intended for him be withheld during the life time of the testator's wife, since those profits were not to be received by her? Why should her death be the event on which lands in which no interest was given to her, should be enjoyed by the devisee? We perceive at once the reason why the devise of those lands in which she had a life estate, should take effect at her death; but there is no reason for postponing the possession of lands from which she could derive no

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benefit, and which were not given to others to the same period.

The devise over too has considerable influence in this question. It may be on a contingency too remote to be supported by law; but the testator's intention is not the less manifested on that account. He did not suppose it too remote; and in fact it might have happened in a few years. Had William King, the devisee, died young, or had William or Rachel Trigg died without leaving a daughter, a fact which has actually happened, and any child of William and Rachel Trigg had married a child of James King or of Elizabeth Mitchel, then the whole estate is given to such child, and to the issue of the marriage. Had either of these events taken place, the estate is given from the heirs. It consists very well with the general intention of the testator and his mode of thinking, as manifested in his will, to suppose an intention that the profits should accumulate for the benefit of those for whom the estate was designed; we can perceive nothing in the will to countenance the idea, that he contemplated the descent of these lands to his heirs. Nothing could be more contrary to his general purpose than the distribution which the law would make of his real estate among his heirs. This may be the result of a total failure of all the provisions in the will, but cannot be considered as the immediate effect, if a contrary intention is perceived, and if the words can be so construed as to support that intention.

The words used by the testator show that nothing was farther from his mind than a partial intestacy. He says, he has thought proper to make his will, "leaving and bequeathing his worldly estate in manner following:" after making a considerable provision for his wife, and devising to others during her life, he gives "all his real estate at her death" to his nephew, on condition, and on failure to perform the condition, gives "the said estate" over. Being about to devise all his estate to his nephew, and knowing that his wife and others would hold a large part of it for her life, it was obvious that his nephew could not take *all* till her death. But if he devised the whole estate, that which could not be taken by the wife or by others for her life, would pass to the nephew,

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if a clear intention appears in the whole will to intercept the descent to the heir; although the clause taken literally, would postpone the possession, even of that part in which the wife has no interest, till her death. To effect this intention, the court will vary the strict meaning of words, and sometimes transpose them. 1 Call, 132. The word "all" may be transposed, so that the clause may read, "in case of having no children, I then leave my real estate, *all*, at the death of my wife, to William King," &c. Let the clause be thus read, and no one could hesitate on its construction. The whole estate is devised to William King; but the possession of that part of it which is given to the wife or others for her life, is postponed till her death. The whole will bears marks of being written by a man whose language was far from being accurate, and whose words, if taken literally, would in some instances defeat his intention. That intention, we think, was to devise his whole real estate to William King, in trust, on a condition subsequent, postponing the possession of that part of it which was given to the wife and others for her life, till her death.

3. The third point is one of great interest to the parties. Did William King take an estate which, in the events that have happened, enures to his own benefit, or is he in the existing state of things to be considered as a trustee for the heirs of the testator?

This question cannot properly be decided in this cause. It belongs to a court of chancery, and will be determined when the heirs shall bring a bill to enforce the execution of the trust. We do not mean to indicate any opinion upon it. The legal title is, we think, in William King, whoever may claim the beneficial interest, and the judgment is therefore affirmed with costs.

Mr Justice JOHNSON dissenting.

The defendant here was plaintiff in ejectment in the court below, in a suit to recover certain lands, part of the estate of William King the elder.

The cause comes up on a case stated according to the

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practice of Virginia, and upon which judgment was rendered for the plaintiff.

The right to recover depends upon the will of William King the elder, and the events that have occurred to defeat or give effect to the provisions of that will.

The operative words of the will are these. "In case of my having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel his wife, in trust for the eldest son or issue of such marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James or of my sister Elizabeth, wife to John Mitchell."

The testator died without issue, and none of the devisees intended to be provided for came within the description of heir at law.

As Mrs Trigg died without having had issue female, the marriage contemplated for William the defendant never became possible; neither has any one of the marriages contemplated in the alternative taken place between the issue of the Triggs and the issue of testator's brother or sister; but from the case stated it appears that, although remote and improbable, the event of one of the contemplated marriages is not impossible.

These however appear to be immaterial facts in the present case; since it has not been contended in argument that the limitation over depending upon the failure of William's marriage with a daughter of the Triggs, is limited by the will to take effect within the term prescribed by the law of executory devises. Unless it could be confined to the life of Mrs King on the failure of William's marriage, it is obvious that the object of that devise over might not come in esse until after every life in being had terminated, and might not marry for more than twenty-one years afterwards.

Without committing myself however on this point, I shall pass it over; considering it only as assumed for the purpose

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of the present argument. After the most diligent attention to the questions in this cause, I cannot help coming to the conclusion, that its difficulties are rather artificial or factitious; and that the true legal view of it is that which is most simple and most consistent with the truth of the case, to wit; that as to the mass of his estate comprised in this clause, the testator's views had been wholly baffled by events; that the devise in favour of the offspring of certain marriages in his own family having altogether failed, the law must dispose of his property, he having made no ulterior disposition of it: and this at last will probably come the nearest to a correct view of the testator's intentions; for we are at liberty to conclude, in the absence of such ulterior disposition, that unless the estate should vest in the manner in which he had proposed to vest it, he was indifferent as to what became of it, or could do no better than leave it to the law. If he had felt that strong predilection for his supposed favourite nephew, the present defendant, which was so much insisted upon in argument, it may be presumed that the interests of that nephew would not have been forgotten.

Much use has been made of this assumed predilection, in order to establish an inference of intention in William's favour.

To my mind the will seems calculated to induce a contrary conclusion; for there is not a provision in the will made in his favour, individually. He takes, if at all, in trust for his own issue, and even that issue is only conditionally an object of favour; unless mingled with the blood of the Triggs, it is rejected, and the blood of the Triggs is followed up into other connexions, to William's entire exclusion. Nor is the offspring of his brother and sister admitted to higher favour, unless they be connected with the offspring of the Triggs.

I think it clear, then, that the primary objects of testator's bounty were the children of the Triggs, or their offspring; and not William or his offspring.

At the close of the argument at the last term, I intimated to counsel my impression that the cause had not been argued on its true grounds. I considered it a case of conditional

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limitation; whereas it was argued exclusively with reference to the law of conditions: the one party maintaining that the marriage of William was a condition precedent, and therefore, as it never took place, nothing ever vested in him; the other, that the marriage was a condition subsequent, and having become, without default in him, impossible, he took the estate discharged of the condition; but both conceding that the cause must be disposed of on the law of conditions.

It is clearly a case of conditional limitation; but if it is to be decided on the law of conditions, instead of the law of contingencies, I think there is abundant reason for maintaining that it is a case of condition precedent, not subsequent. Were this a common law conveyance, I should think differently, for reasons well known to the profession; but in a will there is not one case in a thousand in which it would ever enter the mind of a testator, when he gives upon condition generally, that any interest vests until performance. I feel no hesitation in laying it down as the ordinary import of words of condition in a will, that they impose a condition precedent, unless accompanying words or the general purpose for imposing the condition suggest the contrary. In the present instance, there cannot be a reason consigned, why any interest should vest in William, prior to that marriage which was to give birth to the issue that was the sole object of the testator's bounty. It was not William for whom any beneficial interest was intended, but the issue of a particular marriage, in which the will distinctly shows that the blood of the Triggs was the favoured object. We must force the words of the testator from their simple and natural meaning, before William can in any event become more than a mere trustee in interest. And why create him trustee? At his tender age too, for an event so remote and uncertain; for persons whose coming in esse depended upon so many contingencies, must necessarily be so long deferred; and whose interests would by operation of law be committed into hands so much more competent. Why make him a trustee, who would need himself a guardian?

It has been urged, that the testator has declared he did not mean to die intestate, as to any part of his property;

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and that marriage being a valuable consideration, William must be considered a purchaser.

As to the first of these arguments, it is clear that the testator never lost sight of his avowed intention, and actually did dispose of all his property, though not of all his estate in it; and with so many alternatives and precautions, as might well have satisfied an ignorant man, if not any man, that he could not die intestate as to any part of it. And as to William's being a purchaser, although it might well be denied before the event of his marriage, yet if it be admitted, the consideration in view was not his own advancement, but that of his issue. That was to him a legal and adequate consideration, either for marrying or waiting for the marriage. A purchase made for a child, is a case excepted from that class of resulting trusts which arise when one individual pays the consideration, and another takes the title. The natural feelings imputed to the parent are held sufficient to take the case out of the general rule. 2 Mad. Ch. 116, et passim.

If this will is to be adjudged to vest a present interest in William, subject to be defeated by breach of the condition, or rather waiting to be rendered absolute by the performance of the condition; in other words, if it is to be construed to create a condition subsequent, it must be for the purpose of carrying into effect this will, or some purpose of the testator expressed in it. But if it can be shown that it would be nugatory as to William, and unnecessary as to all other interests, the argument fails.

I can conceive of no interests that can be involved in this question, unless it be, 1. The interests of the devisees over; 2. Those of the heir at law; or, 3. Those of William himself.

Now, as to the first, it would be contrary to the most express terms of the will, to give William a continuing interest, or any present interest. On a question of intention, it is immaterial whether the devise over be too remote or not too remote. The argument is the same, and as to them, the devise creates a *legal* interest: they are not to take under the *trust* to William; but in the event of his marriage failing, the devise

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over is of a *legal* interest, so that the trust is expressly restricted to the object of its creation, which object arises only upon the marriage of William. The words are, "and in case such marriage should not take effect, I leave and bequeath such estate to any child," &c. So that upon the failure of the marriage, the trust was intended to be, as to the devise over, as though it never had been mentioned.

This is expressly limiting William's interest to the purposes of its creation, and rendering it idle and useless, except in the event of the marriage.

And why should the heir at law ask to invest William with an existing interest? He has no need of a legal estate in William to maintain his right. His claim, as of an undisposed residue, is better than of a resulting trust under the devise to William.

Or why should the court adjudge this a condition subsequent in behalf even of William himself? The law is clear, that he can take no beneficial interest under this will; his case is one of the strongest possible against the arising of any implication in favour of a devisee. In the case of *Wheeler vs. Sherval, Mosely*, 301, case 165, in which the executors claimed a beneficial interest in the residue of property given them in trust, the court declares it to be the strongest case possible against them, that they take expressly in trust.

And in the case of *Milnes vs. Slater*, 8 Ves. 308, where a similar claim was preferred, it was held to be conclusive against it, that one of their number was created trustee. The heir is not to be precluded or postponed, except upon express words, or strong, if not unavoidable implication. Here the implications are all against him who would preclude the heir at law.

If then the purpose and the words of the will point to the marriage of William, for the initiation of the testator's bounty, and no interest or object whatever will be subserved by vesting in William a present interest; it follows that the marriage, which is the condition, should be held a condition precedent.

Nor can I feel the force of that argument in favour of a present or beneficial devise to William, which is deduced

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from the circumstance, that no provision is made by the will for the application of the income during the interval that must ensue between the marriage of William and birth of issue; an interval which, by possibility, might last many years.

If this were an application for a maintenance out of that income, such an implication might have weight; but it certainly goes no farther: and even to that point the inference is not unavoidable, since it is perfectly consistent with the character and duties of a trustee, to receive and invest the rents and profits of the trust estate in expectancy of the event which is to appropriate them: And where no specific instructions are given him, a prudent man will claim and receive the directions and protection of a court of equity, in applying such income; it is every day's practice.

If then neither does the will give nor the law imply any beneficial interest to William, there can be no reason for vesting any thing in him before the marriage.

Believing as I do, that if the case must be disposed of upon the question whether the condition, if a case of condition, be precedent or subsequent, it ought to be adjudged a condition precedent; I should here conclude. But as the case has been laid over, and there is no knowing on what point it may go off, I must proceed to examine it in other points of view.

I will then next examine the rights of William upon the hypothesis that it is a condition subsequent.

If a condition subsequent, he can only, in the most favourable view of his interests, be placed in the same relations and acquire the same rights by its becoming impossible, that would have resulted from the performance of the condition.

Suppose then the condition performed, and what would have been the character and extent of his rights? On what principle could he be discharged from the trust on which every thing is given to him that the will gives? Would he have held to his own use or to that of his issue? He would not have acquired an estate tail under the rule in

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Shelly's case, because he was a mere trustee; his legal estate could not unite with the use to his issue so as to make one estate. And if he would have held in trust for his issue by that marriage, what would have been the consequence of his dying without issue? The question is easily answered.

The reversion of the use in the event supposed, never passed from the testator. The disposition of the law was this: upon the death of testator, the whole descended upon the heir, to await the event of William's marriage. Upon his marriage, he would have became entitled to take and hold in trust for the issue of that marriage. But what is the rule of law when a trust is created for an object that never comes into existence, or a purpose that fails? It cannot be questioned that the trustee then holds to the use of the heir at law. I will not say it is absurd, but it does appear to me irreconcilable with any principles that I am acquainted with, that a trust should be converted into a beneficial interest by the occurrence of an event which makes the trust idle and without an object; and it is not easily reconcilable with reason or with the views of the testator, that an interest which the heir at law would unquestionably have retained even after the marriage, should be divested by the impossibility that the marriage should ever take place.

There is not wanting legal authority for maintaining, on the contrary, that had the marriage taken place, and the wife died without issue, so as to render it impossible that the object of the trust should ever come in esse, the estate would immediately have returned to the heir at law. I allude to the case of *Mansfield vs. Dugard*, 1 Eq. Ca. Abr. 195, 1 Fearne, 372, in which the devise was to the wife until the son attained his age of twenty-one years. The son died at thirteen, and it was ruled that the wife's estate determined on the son's decease.

But it is with reluctance I bestow time upon examining these questions, so thoroughly am I satisfied that this case does not turn on the doctrine of conditions. It is a case of conditional limitation, and therefore to be disposed of upon very different principles. Cases of conditional limitation

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partake of the nature of conditions; but they are cases of contingency, and to be adjudged upon the principles applicable to contingent estates. Their distinguishing characteristics are, that they contain a condition either to divest an estate vested, or to prevent the vesting of an estate contemplated, and to carry over the interest to another party, or to some other purpose, not to the heir. Whereas it is indispensable to the legal idea of a condition that it should enure to the benefit of the heir, that he should enter, and that the effect of entry should be the restoration of the original estate, not the creation of a new estate. A conditional limitation is comprised among executory devises, and therefore can be created by will alone; but estates on condition may be created by deed or will. As to the estate to be created or carried over, as well as in those instances in which it anticipates or prevents an estate from vesting, it is obvious that conditional limitations must be assimilated to conditions precedent. But as the contingency may also operate to divest an estate taken presently, it is equally obvious that it then approximates to a condition subsequent in one of its effects. In either case, however, it is regarded as a contingency, and the law of conditions is not applied to it, to any purpose that would defeat the estate of the second taker. It is, on the contrary, so moulded and applied as may give effect to the devise over.

The question, whether this is a case of condition, or of conditional limitation, is easily decided by subjecting it to a very simple and obvious test.

Let us assume for argument, that the devise over on failure of William's marriage is not too remote, that he took under a condition subsequent, and committed a clear breach of the condition. In that event, if this is a case subject to the law of conditions, the heir alone could enter, and his entry would restore the original estate, not carry over an estate to another; for it is a canon of the law of conditions, that although entry for condition broken may defeat one estate, it cannot create a new one, or carry over another estate; it may restore the estate of him who imposed the condition, but does no more.

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What then would become of the devise over^t of the will? and of testator's intention? They would be defeated; and hence words of condition in such cases are construed words of limitation, and the condition converted into a contingency, upon the happening or failure of which the estate devised in the alternative goes over and vests without entry. There is no other mode of carrying into effect the intention of the testator, but by giving to his language a meaning that will comport with that intention. The only difficulty in this cause, and that which probably pre-occupied the attention of counsel with the law of conditions, has resulted from mere casualty. By a series of unanticipated events, the heir at law is at this time actually thrown into the same relation, with regard to the defendant here, in which he would have stood, had the case been one purely of condition. That is, if the devise over be put out of the will, as too remote in its creation, then, in effect, the entry of the heir, if he has a right to enter, would ensue to his own benefit.

But this can make no change in the law of the case. Whatever was the legal character of the right of the parties, it was the effect of the testator's intention as deduced from the will. His intention remains the same, although the arbitrary rules of law may prevent that intention from being carried into effect. The rule of law which converts words of condition into words of limitation in certain cases, proceeds upon intention, and cannot be affected by the occurrence of incidents which defeat the execution of that intention. The present is one of the most frequent and familiar occurrence in the books, of those instances in which that rule of construction prevails. Neither the first taker, nor the devisee ever was heir at law; and in that case lord Hale has said, (Fry's case in Ventris) "that it is a rule which has received as many resolutions as ever point did, that although the word condition is used, limiting the estate over to a stranger makes it a limitation."

For these reasons I am clearly of opinion, that the rule of law applicable to conditions subsequent, when become impossible, is not to govern this case. That it must be disposed of on the law of conditional limitations and William's

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marriage, is to be regarded as a contingency, not a condition.

I have already given my reasons for holding this to be a condition precedent, or rather a contingency which is to vest, not to divest an interest; and this is always a question of intention to be deduced from the views of the testator in imposing conditions. If a condition precedent, then it is one of those instances in which the first estate is anticipated, and never vests; the case becomes a very plain and simple one, and the will must operate as if it read thus, "if W. K. shall marry a daughter of the Triggs, then I give the residue to him in trust, &c.; if such marriage shall not take place, then I give it over." And thus construed, there can be little doubt that the will comes nearest to the good sense of the case and the views of the testator. Nor can there be any ambiguity in the law of the case, if so construed. William would take nothing, because he never married; and the devise over being too remote, there is no first taker to carry the estate. It is then an undisposed residue, and to be distributed according to the *lex loci*. Under this view of the case, the judgment must certainly be against William King.

But if he took a present interest, defeasible upon the condition or contingency of refusing to marry a daughter of the Triggs; then the inquiry is, what effect has it upon the state of right in a case of conditional limitation, that without his fault such condition or contingency becomes impossible? On this point, which is very much of an authority question, it must be acknowledged there is a great dearth of adjudged cases, as well as of learning in elementary writers.

If it may be decided with analogy to trusts, the objects of which have failed or never come in esse; then they are considered as determined in favour of the heir at law, as in the bishop of Durham's case. If it may be determined by analogy to the case of estates to endure until the happening of an event that has become impossible; then I have showed that it determined presently in favour of the devise over; the court declaring in the case of *Mansfield vs. Dugard*, that he may wait for ever if his right is to be suspended on an impossible event.

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And if in the absence of any other established rule we may be guided by the polestar of devises, the testator's intention, certainly nothing could comport less with his views, than to permit an event which he looked forward to as the certain cause of divesting William of even his fiduciary interest, to have the effect of vesting in him an absolute beneficial interest, or any other interest which could stand in the way of the claim of his own legal representatives.

If we submit the question to the plainest test of reason as applied to the law of limitation and contingencies; then it seems incontrovertible, that when a limitation over is made to depend upon the failure of a certain event, the limitation ought to take effect whenever it is ascertained that the event must fail, as when it has become impossible; and equally so, that when a previous interest, although passing presently into possession, awaits its confirmation from the happening of a certain event, that there is no reason for continuing that estate, when it is definitively established that the event on which it depends for confirmation can never happen. These were the principles recognized in the case of *Mansfield vs. Dugard*, and I think the reasonable result of all the doctrine of conditional limitations considered under the three heads into which the cases are usually distributed. There was a case cited in argument to sustain the judgment below, on which so much reliance was placed that I shall not pass it over unnoticed. It is the case of *Thomas vs. Howel*, reported in *Salkeld and Modern*, (1 Salk. 170. 4 Mod. 66.) and very defectively reported in both. The report in *Salkeld* does not give the half of the case; and that in 4 Mod. gives a very unsatisfactory account of the reasons which governed the court. An attentive examination of the facts, however, will enable us to understand the case, and to explain it in perfect conformity with the principles which govern my opinion.

It was a curiously mixed case, in which the law of conditions and conditional limitations were so blended as to have been scarcely severable. It was the case of a father, tenant in fee, and his three daughters, constituting his heirs at law. The father devises to one of the daughters a messuage called

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Lawhorn, "upon condition that she marry T. T., and if she refuse to marry him, then over to trustees in trust to be divided among the three co-heiresses, equally or otherwise as they please." The marriage became impossible by the death of T. T. under twelve, and the question was which to apply to it, the law of conditions or the law of limitations. The majority of the court, three out of four, decided, that it came within the law of conditions. One held it to be a conditional limitation. On this case I would remark,

1. That it was well disposed of upon the law of conditions, for the devise over was in effect to the heir at law, so that the entry for condition broken would not have defeated the will, but have carried it into effect; the reason therefore for construing words of condition into words of limitation did not exist, especially as it is presumable that there was nothing to prevent the operation of the statute of uses in favour of the devisee over under the trust in the will, but,

2. There was room for a doubt on the question arising from the effect of interposing the trust, especially if the power of making an unequal distribution was well given to the trustees; for then the entry of the heirs would have defeated the testator's views; and it ought to have been held a limitation, according to the opinion of the dissenting judge.

3. I think it very clear, that the case alluded to was argued and decided under a general admission of bench and bar, that if held to be a case of condition, the effect of the condition's becoming impossible, would be in favour of the first taker; but if held to be a case of conditional limitation, that it would be in favour of the party claiming under the devise over. If the effect had been held to be the same in both cases, it would have been utterly idle to raise a question upon the will.

And lastly. That when the judges in that case come to the conclusion that it was a case of condition, and not of limitation, they proceed to examine the question, whether a condition precedent or subsequent, with a view to the leading motive of the testator, little regarding any particular phraseology. And certainly with a view to induce T. T. to address

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the daughter, the more beneficially the will operated in her behalf, the greater would be the inducement held out; and accordingly they make it a condition subsequent. But a contrary reason operates here, for the leading motive is not the establishment of William King, but the formation and advancement of a particular family connexion. It would then have comported best with this testator's views to super-add the inducement of necessity, in order to incline William King to the proposed matrimonial connexion.

There could have been no reason for giving it to him until the marriage took effect; it would have been better to let it accumulate in the hands of the executors, especially considering his tender age at the date of the will.

Upon the whole I am satisfied, that if this case is to be disposed of on the law of conditions, there is nothing in the will or the views of the testator that should make it a condition precedent; and nothing certainly has occurred since to make it necessary to give it that character; for had he married, there would have been a resulting trust in favour of the heirs if the marriage failed to produce issue, and that would only have left the heir at law where he is now, without owing any thing to the aid of a trust. Whence it results, that it would have been useless and idle to have vested any interest in William at any time.

But I am perfectly satisfied that the case is one to which the law of limitations and contingencies alone is applicable, and that according to the principles that govern that class of cases, the impossibility of the contingency does not confirm the estate in the first taker, but defeats it.

I am therefore of opinion, that the judgment below should be reversed.

ANONYMOUS.

Certified copies of the opinions of the court, delivered in cases decided by the court, are to be given by the Reporter; and not by the Clerk of the court.

MR WIRT moved the court to order copies of the opinion of the court delivered at this term in the case of Shanks et al. vs. Dupont et al., ante 242. to be certified with the judgment of the court, under the seal of the court. He stated, that he made the application on behalf of a gentleman who was interested in a case depending in England, upon similar principles with those decided in the case referred to; and the object was to lay the proceedings of this court, in an authenticated form, before the court in Great Britain, which was to decide the case depending there.

Mr Chief Justice MARSHALL said, that the Reporter of the court is the proper person to give copies of the opinions delivered by the court. The opinions were delivered to him after they were read, and not to the Clerk, and they were not therefore in his office to be copied. Not being filed in the clerk's office, he could not certify copies of the opinions under the seal of the court.

If an authenticated copy of the opinion of the court is desired, the Reporter only could furnish it, certified; and the Clerk of the court may certify, under the seal of the court, that he is the Reporter; if this should also be required.

WILLIAM FOWLE, SURVIVING PARTNER, PLAINTIFF IN ERROR vs.
THE COMMON COUNCIL OF ALEXANDRIA.

The plaintiff placed goods in the hands of an auctioneer in the city of Alexandria, who sold the same, and became insolvent, having neglected to pay over the proceeds of the sales to the plaintiff. The auctioneer was licensed by the corporation of Alexandria, and the corporation had omitted to take from him a bond with surety for the faithful performance of his duties as auctioneer. This suit was instituted to recover from the corporation of Alexandria the amount of the sales of the plaintiff's goods, lost by the insolvency of the auctioneer, on an alleged liability, in consequence of the corporation having omitted to take a bond from the auctioneer.

The power to license auctioneers, and to take bond for their good behaviour, not being one of the incidents to a corporation, must be conferred by an act of the legislature; and in executing it, the corporate body must conform to the act. The legislature of Virginia conferred this power on the mayor, aldermen and commonality of the several corporate towns within that commonwealth, of which Alexandria was then one; "provided that no such license should be granted until the person or persons requesting the same should enter into bond with one or more sufficient sureties, payable to the mayor, aldermen and commonality of such corporation." This was a limitation of the power. [407]

Though the corporate name of Alexandria was "the mayor and commonality," it is not doubted that a bond taken in pursuance of the act would have been valid. [407]

The act of congress of 1804, "an act to amend the charter of Alexandria," does not transfer generally to the common council, the powers of the mayor and commonality; but the powers given to them are specially enumerated. There is no enumeration of the power to grant licenses to auctioneers. The act amending the charter, changed the corporate body so entirely as to require a new provision to enable it to execute the powers conferred by the law of Virginia. An enabling clause, empowering the common council to act in the particular case, or some general clause which might embrace the particular case, is necessary under the new organization of the corporate body. [408]

The common council granted a license to carry on the trade of an auctioneer, which the law did not empower that body to grant. Is the town responsible for the losses sustained by individuals from the fraudulent conduct of the auctioneer? He is not the officer or agent of the corporation, but is understood to act for himself as entirely as a tavern keeper, or any other person who may carry on any business under a license from the corporate body. [409]

Is a municipal corporation, established for the general purposes of government, with limited legislative powers, liable for losses consequent on its having misconstrued the extent of its powers, in granting a license which it had no authority to grant, without taking that security for the conduct of the person obtaining the license, which its own ordinances had been supposed to require, and which might protect those who transact business with the persons acting

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under the clause? The court find no case in which this principle has been affirmed. [409]

That corporations are bound by their contracts is admitted. That money corporations, or those carrying on business for themselves, are liable for torts is well settled. But that a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a nonfeasance, by an omission of the corporate body to observe a law of its own, in which no penalty is provided; is a principle for which we can find no precedent. [409]

The act of Virginia, passed in 1792, authorises a defendant to plead and demur in the same case. [409]

ERROR to the circuit court for the county of Alexandria, in the district of Columbia.

This was an action on the case brought by the plaintiff in error, against the defendants, in the circuit court, for damages charged to have been sustained by the plaintiff, in consequence of the neglect of the defendants to take due bonds and security from one Philip G. Marsteller, licensed by them as an auctioneer, for the years 1815, 1816, 1817, and 1818, according to the alleged provisions of the statute in that behalf enacted.

The declaration and pleadings are fully stated in the opinion of the court. The defendants filed a general demurrer, and pleaded the general issue.

The counsel for the plaintiff objected to the defendants' demurring; and pleading at the same time to the declaration; but the court overruled the objection, conceiving that they had a right to permit such a course of proceeding under the statute of Virginia, which is in these words: "the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence."

The court then proceeded to consider the matters of law arising upon the demurrer, and decided that the declaration and the matters therein contained, were not sufficient in law to maintain the plaintiff's action; and the plaintiff prosecuted this writ of error.

The case was argued by Mr Swann for the plaintiff, and by Mr Jones and Mr Taylor for the defendants.

For the plaintiff, it was contended, that the circuit court erred;

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1. In deciding that the action was not sustainable on the declaration.
2. In permitting the demurrer and plea to be both filed at the same time to the declaration.

Mr. Swann, for the plaintiff in error, stated that this case had been before the court in 1826, and was sent back; the court having determined that a new trial should be awarded.

11 Wheat. 320. On the argument on the former hearing, the plaintiff in error, as he does now, contended, that the corporation of Alexandria were liable for the neglect of their duties, and for the damages sustained by individuals in consequence of the same. On that argument, and in support of the principles then asserted, there were cited, *Yarborough vs. The Bank of England*, 16 East's Rep. 6. *Riddle vs. The Proprietors, &c.* 7 Mass. Rep. 169. The principles on which the whole claim of the plaintiff rested having been thus fully stated and discussed, and the authorities for them having been vouched, the plaintiff had a right to believe that when the case was remanded upon technical rules, and without a disaffirmance of the principles on which the claim was then placed, they had the sanction of this court. The court will now say whether the question of responsibility is still open.

If it is to be discussed; a reference to the authorities formerly cited, will dispose of it in favour of the plaintiff in error. The liability charged to the corporation is fully within the rules to be found in adjudged cases. Those which were cited sustain the principle. Banks are liable for negligence; and the law of corporation, as it is now understood, places such bodies under the same obligations, and gives the same remedies against them as are given in the cases of individuals. They have been held answerable to this extent by this court. *Clark vs. The Corporation of Washington*, 12 Wheat. 40. *Bank of Columbia vs. Patterson's Administrators*, 7 Cranch, 209.

As to the second point. There cannot be a plea and a demurrer to the same declaration. It is competent for a defendant to plead as many matters of fact as he desires; or he may do so as to matters of law; but upon the rules of

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pleading, both cannot be done. A demurrer admits the facts, and raises questions of law upon them; a plea puts them in issue. There is, therefore, a direct contradiction between them.

This practice does no good to the party adopting it. Nothing is decided by either course until all is decided, and the opposite party is exposed to great trouble. By pleading alone, the whole questions of law and fact which arose in the case would have been fully presented for decision. It is denied that the law of Virginia sanctions this practice. The act of Virginia, of 1784, prohibited pleading and demurring to the same declaration.

Mr Taylor and Mr Jones, for the defendants.

The plaintiff in error intended to present this question of the liability of the defendants, but this has not been done in the declaration. It is asserted by him, that the defendants, a municipal corporation, are liable to him for damages for not carrying their own laws into effect.

The suit is against the common council of Alexandria; for appointing an auctioneer, without taking a bond with sureties for the performance of his duties. The second count alleges the liability of the defendants, for suffering the auctioneer to act without having given security. It should appear what the damages sustained by the plaintiff were; and the declaration should have shown the power of the corporation, and their obligation to exercise those powers for the protection of the plaintiff from those damages.

What damages has the plaintiff sustained? It is assumed, that had the bond been taken, he would have been indemnified by its provisions, and that it would have covered the defalcations of the auctioneer. The duties of the defendants should have been specified by a reference to the laws enjoining them; the suit is in the nature of a penal action, and nothing should have been left to inference.

It has not been shown that the common council of Alexandria has the power to grant licenses to auctioneers. The law of Virginia, of 1796, gave that authority to "the mayor, aldermen and commonality;" but does this extend to auth-

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rise “the common council?” The next law gives the authority to “the mayor and commonalty.” There is no averment that the common council is the same body with the corporations mentioned in these acts.

The counsel then went into an examination of the laws of Virginia, incorporating the city of Alexandria, and of the act of congress on the same subject, to show that the power to take a bond from an auctioneer did not exist, or had not been continued or transferred from the corporation as originally established to that now existing, and against which the suit was instituted.

They also contended; that the claim of the plaintiff presented a case in which a corporation was asserted to be liable for having omitted to legislate for the protection of those who dealt with an officer acting under an authority derived from the corporation. Such a claim could not be maintained. It was also urged that had a bond been taken from the auctioneer, it would not have enured to the benefit of individuals transacting business with him. Its operation would have been to govern his public duties, and not to operate on his private transactions. Between the corporation taking such a bond, and those who dealt with the auctioneer, there was no such affinity as would permit them in case of default to claim the benefit of the bond. Such a provision might have been by law made, but this not having been done, its omission gave no ground of action.

As to the second point; a reference to the act of the legislature of Virginia, passed in 1792, would fully satisfy the court that a defendant has a right to plead and demur in the same case. This has been decided in the courts of Virginia. 4 Hen. & Munf. 276, 277. 2 Munf. 100.

Mr Swann, in reply, contended; that the acts incorporating the city of Alexandria, and particularly the acts of congress, were public acts; and it was not therefore necessary to introduce them into the pleadings. The court would take notice of those laws as public laws.

Until 1804, the corporate name of the defendants was “the mayor and the commonalty;” since that year it has been “the common council of Alexandria.” The law of Virginia

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at 1796, was a general public law, relating to all corporations, and became necessarily a law of this district. Without that law, the corporation had no right to license the auctioneer. The act of 1800 was passed under the authority of the law of 1796, and that act authorises a suit on the bond of an auctioneer by the party injured.

By the law of 1804 the corporation may pass all laws not inconsistent with the laws of the United States; and the plaintiff claims the benefit of the obligation imposed by the laws. The corporation was bound to take a bond with security on granting a license to an auctioneer.

By the appointment of the auctioneer the defendants held out to the community that they had taken a bond. They gave the auctioneer the credit upon which the plaintiff trusted him with his goods. They authorised him to carry on the business out of which the loss arose; a business he could not have entered upon without the license he received from the corporation.

On a demurrer every thing is to be inferred against the party demurring. The facts are admitted, and whatever conclusion they warrant may be drawn by the court. The facts show the omission to take the bond, and the inference is authorised that this was gross negligence, for which the defendants are answerable.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

In December 1796, the general assembly of Virginia passed an act entitled "an act concerning corporations," declaring, "that from and after the passing thereof, the mayor, aldermen, and commonalty of the corporate towns within the said commonwealth, and their successors should, upon request of any person desirous thereof, grant licenses to exercise, in such town, the trade or business of an auctioneer; provided, that no such license should be granted until the person or persons requesting the same should enter into bond with one or more sufficient sureties, payable to the mayor, aldermen, and commonalty of such corporate town, and their successors, in such penalty, and with such

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condition; as by the laws and ordinances of the town shall be required.

In the year 1779 the town of Alexandria was incorporated by the name of "the mayor and commonalty of the town of Alexandria." The corporation consisted of the mayor, recorder, aldermen, and common council men.

The mayor, recorder, and aldermen, and their successors, were constituted justices of the peace, with power to appoint constables, surveyors of the streets and highways, and to hold a court of hustings once in every month; and to appoint clerks, a sergeant, and other proper officers.

In the year 1800 the mayor and commonalty passed an ordinance "for licensing auctioneers agreeably to an act of the general assembly, passed on the 22d of December 1796;" by which it was enacted, that the mayor and commonalty shall grant to any person or persons during the same, a license to exercise the trade or business of an auctioneer within the town. Provided that no such license shall be granted until the person or persons applying shall enter into bond, with one or more good securities, in the sum of twenty thousand dollars, payable to the mayor and commonalty, and conditioned for the payment of the annual rent of five hundred dollars, to the mayor and commonalty, in quarterly payments, for the said office, and for the due and faithful performance of all the duties of the same; which bond shall not become void on the first recovery, but may be put in suit and prosecuted from time to time, by, and at the costs of any person injured by a breach thereof, until the whole penalty shall be recovered.

In 1804 congress passed an act "to amend the charter of Alexandria," in which provision was made for the election of a common council. The judicial duties of the mayor, recorder, and aldermen, having been transferred to the circuit court of the United States for the county of Alexandria, it was enacted that the common councils elected "and their successors shall be, and hereby are made a body politic and corporate, by the name of the common council of Alexandria." The estate, &c. vested in the mayor and commonalty was transferred to the common council, and the usual cor-

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porate powers to sue and be sued, &c. to erect work-houses, &c. to provide for the police of the town, &c. were conferred on that body. They were authorised "to appoint a superintendent of police, commissioners and surveyors of the streets, constables, collectors of the taxes, and all other officers who may be deemed necessary for the execution of their laws, who shall be paid for their services a reasonable compensation, and whose duties and powers shall be prescribed in such manner as the common council shall deem fit for carrying into execution the powers hereby granted."

The twelfth section enacts "that so much of any act or acts of the general assembly of Virginia, as comes within the purview of this act, shall be, and the same is hereby repealed. Provided, that nothing herein contained shall be construed to impair or destroy any right or remedy which the mayor and commonalty of Alexandria now possess or enjoy, to or concerning any debts, claims, or demands against any person or persons whatsoever, or to repeal any of the laws and ordinances of the mayor and commonalty of the said town, now in force, which are not inconsistent with the act."

In June 1817 the common council of Alexandria passed "an act to amend the act for licensing auctioneers, and for other purposes," in the following words: "be it enacted by the common council of Alexandria, that every person or persons obtaining a license to exercise the business of an auctioneer within the town of Alexandria, shall annually apply for, and obtain a renewal of his or their license, and shall also annually renew his or their bonds for the same, in the manner provided by law; and every person failing to renew such license, and give bond annually, shall cease to exercise the business of an auctioneer, and shall be proceeded against accordingly."

The declaration, after reciting the act of 1796, and the several ordinances of the corporate body of the town of Alexandria, charges, that the common council of Alexandria, on the day of , in the year 1815, in the town of Alexandria, did grant a license to one Philip G. Marsteller, to exercise the trade and business of an auctioneer, within the said town, for the term of one year; and at the expiration

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of the said year, did renew the said license to the said Philip G. Marsteller for one other year, and did continue to renew the said license from the end of the said last mentioned year, from year to year, until the day of , in the year 1819, during all which time, that is to say, from the day of , in the year 1815, to the day of , in the year 1819, he, the said Philip G. Marsteller, did exercise the trade and business of an auctioneer, in the said town of Alexandria, under the said license and authority of the said common council, and that, during the period aforesaid, the said plaintiff delivered to him, the said Philip G. Marsteller, sundry goods, wares, and merchandize, to be sold by him at auction, in the said town of Alexandria, and that the said Philip did, from time to time, during the period he so carried on the trade of an auctioneer, under the license aforesaid, sell at auction the said goods, &c. so delivered to him by the plaintiff, to the amount of \$1583 09, which said sum, the said Philip, though often requested, failed to pay to the said plaintiff.

The declaration then states, that a judgment was obtained against the said Philip for the said sum, which he was totally unable to pay; by means of which premises the plaintiff became entitled to the benefit of the bond and security, which ought to have been taken by the common council previous to granting the said license to exercise the trade of auctioneer as aforesaid. Yet the defendants, not regarding their duty in that behalf, but contriving to deceive and injure the plaintiff, did not, and would not take any bond and security as aforesaid, from the said Philip G. Marsteller, during the time when the transactions aforesaid took place; but on the contrary, so carelessly, negligently, and improperly conducted themselves in the premises, that by and through the negligence, carelessness, and default of the defendants, no bond and security was taken from the said Philip, and that the money due from the said Philip was wholly lost to him, the said plaintiff, to his damage \$3000.

To this declaration the defendants filed a general demurrer, and at the same time pleaded the general issue.

The counsel for the plaintiff objected to receiving at the

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same time a demurrer, and a plea to the whole declaration, but the court overruled the objection, under the act of assembly, which is in these words: "the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence."

The court, having sustained the demurrer, and entered judgment for the defendants; the plaintiff has brought the cause by writ of error into this court.

"The power to license auctioneers, and to take bonds for their good behaviour in office, not being one of the incidents to a corporation, must be conferred by an act of the legislature; and in executing it, the corporate body must conform to the act. The legislature of Virginia conferred this power on the mayor, aldermen, and commonalty of the several corporate towns within that commonwealth, of which Alexandria was one; "provided that no such license should be granted until the person or persons requesting the same should enter into bond, with one or more sufficient securities, payable to the mayor, aldermen, and commonalty of such corporation." This was a limitation on the power.

Though the corporate name of Alexandria was "the mayor and commonalty," it is not doubted that a bond taken in pursuance of the act would have been valid. Jones, 261.

In the year 1800, when the corporation of Alexandria determined to act upon this law, an ordinance was passed authorising "the mayor and commonalty" to grant licenses to auctioneers, provided that no such license should be granted, until bond with sufficient sureties should be given, payable to "the mayor and commonalty." It may well be doubted, whether this ordinance is sustained by the legislative act, in pursuance of which it was made. That act authorised "the mayor, aldermen and commonalty" to grant licenses to auctioneers, first taking bonds payable to the "mayor, aldermen and commonalty." The ordinance omits the "aldermen," both in the clause which empowers the body to grant licences, and in that which names the obligees in the bond.

But supposing this difficulty to be entirely removed, we

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are next to inquire whether the powers to grant licenses to auctioneers, and to take bonds for the performance of their duty, which were given by the act of 1796 to the mayor, aldermen and commonalty, and by the ordinance of 1800 to the mayor and commonalty, have been transferred to, and vested in the common council of Alexandria.

This depends on the act of congress, passed in 1804, "to amend the charter of Alexandria." Under this instrument, the corporate body consists of the common council alone. The mayor is separated from them, and the aldermen are discontinued. The power of the mayor and commonalty are not transferred generally to the common council, but the powers given them are specially enumerated. We do not find, in the enumeration, the power to grant licenses to auctioneers. If it could be maintained that the repealing clause does not comprehend the act of 1796, still the act amending the charter changes the corporate body so entirely, as to require new provisions to enable it to execute the powers conferred by that act. The corporate body is organized anew, and does not retain those parts which are required for the execution of the act of 1796. An enabling clause, empowering the common council to act in the particular case, or some general clause which might embrace the particular case, is necessary under the new organization of the corporate body. It has been already said that we find no particular provision, and the general powers granted are so limited by the language of the grant, that they cannot be fairly construed to comprehend the subject of licenses to auctioneers.

It may be admitted that the ordinance of 1800 is not repealed by the act amending the charter. But that ordinance is not adapted to the new corporate body, and could not be carried into execution by the common council, till modified by some act of legislation.

The common council took up this subject in 1817, and passed the act recited in the declaration. We are relieved from inquiring whether this act removed or could remove the difficulties which have been stated, by the circumstance that the declaration changes the nonfeasance, which is the

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foundation of the action, as commencing in the year 1815. We do not think any law then existed which empowered the common council of Alexandria to license auctioneers, or to take bonds for the faithful performance of their duty. The injury alleged in the declaration, as the foundation of the action, is the omission to take the bond required by law. Now if the common council was not required or enabled by law to take a bond, the action cannot be sustained.

If the declaration is to be considered as stating the cause of action to be the granting a license, without previously requiring a bond; it will not, we think, help the case. The common council has granted a license to carry on the trade of an auctioneer, which the law did not empower that body to grant. Is the town responsible for the losses sustained by individuals from the fraudulent conduct of the auctioneer? He is not the officer or agent of the corporation, but is understood to act for himself as entirely as a tavern keeper, or any other person who may carry on any business under a license from the corporate body.

Is a municipal corporation, established for the general purposes of government, with limited legislative powers, liable for losses consequent on its having misconstrued the extent of its powers, in granting a license which it had not authority to grant, without taking that security for the conduct of the person obtaining the license which its own ordinances had been supposed to require, and which might protect those who transacted business with the person acting under the license? We find no case in which this principle has been affirmed.

That corporations are bound by their contracts is admitted; that money corporations, or those carrying on business for themselves, are liable for torts, is well settled: but that a legislative corporation, established as a part of the government of the country is liable for losses sustained by a non-feasance, by an omission of the corporate body to observe a law of its own, in which no penalty is provided, is a principle for which we can find no precedent. We are not prepared to make one in this case.

In permitting the defendant below to demur and plead to

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the whole declaration, the circuit court has construed the act on that subject as it has been construed by the courts of Virginia.

There is no error, and the judgment is affirmed with costs.

This cause came on to be heard on the transcript of the record from the circuit court of the United States, for the district of Columbia, held in and for the county of Alexandria, and was argued by counsel; on consideration thereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed with costs.

JOHN CLAY, PLAINTIFF IN ERROR vs. ABRAHAM SMITH.

The plaintiff below, a citizen of the state of Kentucky, instituted a suit against the defendant, a citizen of Louisiana, for the recovery of a debt incurred in 1808, and the defendant pleaded his discharge by the bankrupt law of Louisiana in 1811; under which, according to the provisions of the law, "as well his person as his future effects" were for ever discharged "from all the claims of his creditors." Under this law, the plaintiff, whose debt was specified in the list of the defendant's creditors, received a dividend of ten per cent on his debt, declared by the assignees of the defendant. Held, that the plaintiff, by voluntarily making himself a party to those proceedings, abandoned his extraterritorial immunity from the operation of the bankrupt law of Louisiana; and was bound by that law to the same extent to which the citizens of Louisiana were bound.

The plaintiff in error having died while the cause was held under advisement, the judgment was entered *nunc pro tunc*, as on the first day of this term.

ERROR to the district court of the eastern district of Louisiana.

This case was argued at January term 1828, by Mr Livingston, and was held under advisement until this term; on the suggestion of counsel, and for information upon the law of the state of Louisiana, referred to in the opinion of the court.

Mr Justice JOHNSON delivered the opinion of the Court.

This case comes up from the Louisiana district, by writ of error, to reverse a judgment obtained there by Smith *vs.* Clay.

Smith, is a citizen of Kentucky, and Clay, of Louisiana; and the action was brought to recover a debt incurred in the year 1808.

Clay's defence rests upon the validity of a discharge obtained in a court of the state, under a law of the state, in the year 1811. The plea sets out his petition to the court; his surrender of his effects; the schedule of his debts, in which Smith's debt is specified, as also the payment to him of ten per cent, the dividend declared by the assignees of

[*Clay vs. Smith.*]

the bankrupt ; and the judgment of the court, rendered in pursuance of the consent of more than a majority of his creditors in number and amount, that he be discharged, "as well his person as his future effects, from all the claims of his creditors." The language of the plea is, " upon which said petition, the usual proceedings being had thereon, the said plaintiff and other creditors and said defendant being parties thereto, the said supreme court by their final decree pronounced in the premises, on the 15th of June 1811, declared the said defendant, as well his person as his subsequently acquired property and effects, for ever released from all claims, debts, and demands," &c. previously due.

This plea is demurred to, and thus the question is raised, whether Smith, by voluntarily making himself party to such proceedings, has not abandoned his extra-territorial immunity from the operation of the bankrupt laws of Louisiana.

We are of opinion that he did ; and was bound by the decision of the state court to the same extent to which the citizens of that state were bound.

Judgment reversed.

Case remanded, with instructions to enter judgment for defendant there. And in consequence of the death of Clay, while the cause was held under advisement, that it be entered, *nunc pro tunc*, as on the first day of this term.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of Louisiana, and was argued by counsel ; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said district court in this cause be, and the same is hereby reversed, and that the cause be, and the same is remanded to the said district court, with instructions to the said court to enter judgment for John Clay, the defendant in said court. And it is further ordered by the court, that in consequence of the death of the said Clay, while this cause was held under advisement, that judgment be entered, *nunc pro tunc*, as on the first day of this term.

**WILLIAM PARSONS, PLAINTIFF IN ERROR vs. JAMES ARMOR AND
T. W. OAKLEY, SYNDICS OF THE CREDITORS OF JAMES ARMOR.**

Error from the district court of Louisiana. The record consisted of the petition, the answer, the whole testimony, as well depositions as documents, introduced by either party, and the fist of the judge, that Armor, the plaintiff below, recover the debt as demanded. The difficulty is to decide under what character we shall consider this reference to the revising power of this court. If treated strictly as a writ of error, it is certainly not an attribute of that writ, according to the common law doctrine, to submit the testimony as well as the law of the case to the revision of this court; and then there is no mode in which the court can treat this case, but in the nature of a bill of exceptions. The court is not at liberty to treat this case as an appeal in a court of equity jurisdiction, under the act of 1803; because the party has not brought up his cause by appeal, but by writ of error. [425]

F. at New Orleans, was the correspondent of P. at Boston, received goods from him on consignment, and was from time to time directed to purchase produce, and ship the same to P., and was instructed to draw on P. for the funds to pay for the same. When he made purchases, "the bills of parcels were made out in the name of F., and the accounts assured in the books of the different merchants in his name." The general course of the business was, that P. sent out, in his own vessels, merchandise to F. which was sold by F., and F. at the request of P. purchased from merchants in New Orleans produce, and shipped the same as ordered by P.; and to put himself in funds for the same when necessary, drew bills of exchange on P., who had always, until the presentation of the bills on which this suit was brought, accepted and paid the same; but he did not in his purchases act under the idea that he was restricted in his purchases to the drawing of bills for the payment of the articles purchased for P. F. purchased a quantity of tobacco to be shipped to P., and payment for the same in bills on P. made a particular part of the contract for the purchase. At the time of the purchase, F. showed to the vendor of the tobacco the letters from P., ordering the purchase and shipment of the same. Some of the bills drawn by F. on P., and which were delivered to the vendor of the tobacco in payment for the same, were refused acceptance and payment, and this suit was instituted for the recovery of the amount of the bills from P. Held, that P. was not liable to pay the bills. [426]

The general rule is, that a principal is bound by the act of his agent no further than he authorises that agent to bind him; but the extent of the power given to an agent is decided as well from facts as from express delegation. In the estimate or application of such facts, the law has regard to public security, and often applies the rule "that he who trusts must pay." So also, collusion with an agent to get a debt paid through the intervention of one in failing circumstances, has been held to make the principal liable on the ground of immoral dealing. [428]

A bill of exchange is the substitute for the actual transmission of money by sea or land. Power therefore to draw on a house in good credit, and to throw the

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bills upon the market, is equivalent to a deposit of cash in the vaults of the agent. There is not the least title of evidence in this cause to show that P. meant to use the credit of the drawer of the bills on which the suit is brought, or to authorise him to pledge his credit in any thing but the negotiation of the bills. This depended on the confidence which merchants of New Orleans who wished to remit would place in the solvency and integrity of the drawer and drawee; and had no connection whatever with the application of the money thus raised to the purchases ordered by the principal. As to those purchases, the agent was authorised to go no further than to apply the funds deposited with him. [428].

Of the general power to protest the bills of one who has overdrawn, there can be no question; for it is the only security which one who gives a power to draw bills, and throw them on the market, has against the bad faith of his correspondent. He takes the risk of paying the damages, if in fault; or of throwing them on the other, if he has actually abused his trust. It is a question between him and his correspondent. [429].

The currency which a merchant may give to bills drawn on him by a correspondent, by payment of such bills, does not deprive him of the security he has a right to, by refusing his acceptance of other bills so drawn. [430].

It does not affect the merits of this cause, that the original contract was made for a payment in bills. Such was not the negotiation to which P. had limited F.; it was no more between P. and the vendor of the tobacco than a purchase of bills with the cash received for the tobacco. [430].

THIS was a writ of error to the circuit court for the eastern district of Louisiana.

James Armor, a merchant of New Orleans, sued William Parsons, a merchant of Boston, in the parish court of New Orleans, by petition, setting forth, that in June 1825, he sold to one Eben Fiske, acting as the agent of Parsons, tobacco to the amount of \$17,311 99, in consideration whereof Fiske drew sundry bills of exchange on Parsons, all which were honoured and paid, except two, one for \$1443 29, and the other for \$4123 71, which were not accepted or paid; and charging that Parsons owes him the amount of the two bills, viz. \$5567. Certain merchants of New Orleans were sued as garnishees of Parsons. The cause was duly removed into the circuit court of the United States; and James Armor having failed, he himself and Oakey were appointed syndics of his creditors.

Some objection to the jurisdiction was taken, and overruled; and a general answer put in, by Parsons, denying his liability.

The bills of exchange were dated July 2, 1825; one was

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for \$1443 29, at 60 days; the other, for \$4123 71. The drawing, presentment, and protest of these bills were proved.

When the cause came to be heard, both parties waived the trial by jury, and agreed that the court should decide whether the defendant was responsible to the plaintiffs, upon the facts as they appear disclosed in writing, and filed in the case.

The papers filed in the case, and brought up with the record, contained admissions that, by the laws of Massachusetts, the rate of interest is six per centum per annum, and ten per cent. damages on protested bills of exchange; and that, by the laws of Louisiana, the interest is five per cent. per annum on bills protested from the date of protest, and the like damages of ten per centum.

The depositions and the evidence in the cause were also in the record, set out at large. The depositions proved the course and nature of the business carried on by Eben Fiske at New Orleans, and also the particulars of some of the transactions between Mr Parsons and Mr Fiske. The deposition of Mr Fiske states these transactions and their character more fully. The deposition is as follows:

Eben Fiske, a commission merchant in New Orleans in 1825, a witness for plaintiffs, states that in the fall of the year 1821 he commenced transacting business for the defendant, Mr Parsons of Boston, in the city of New Orleans, and so continued up to the latter end of the summer of 1825. That during this period, between 1821 up to 1825, witness was the only person transacting business for said William Parsons in the city of New Orleans. That the general course of the transactions between them was, that the said Parsons sent out to New Orleans iron, steel, nails, brads, &c. consigned to witness, which he, witness, would sell as occasion offered, most frequently on credit. That the vessels of said Parsons visited New Orleans every year, when witness, on account of said Parsons, purchased from the merchants of New Orleans tobacco, cotton, logwood, and such articles as Mr Parsons would request, which were put on board the vessels of said Parsons, and on his account transported to different ports in Europe and America. To put himself in

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funds for these purchases so made, witness drew his bills of exchange on said Parsons of Boston, which had always been duly accepted, and paid up to the month of August 1825, when the first bill, so drawn by witness on said Parsons, was protested. The purchases so made by witness each year, in the business season, for the articles required by Mr Parsons, were to a large amount, from fifty thousand to one hundred thousand dollars annually: that accounts current were kept between them, witness and said Parsons; that witness would charge said Parsons with purchases made for him, as well as for the disbursements of his vessels and other expenses and charges, and would credit said Parsons with bills drawn on him from time to time, and the proceeds of nails, iron, steel, &c. as sold. The nature of transactions between witness and said Parsons will appear from the accounts.

In June 1825, witness purchased, on account of said Parsons, from James Armor, a merchant of New Orleans, one hundred and eighty hogsheads of tobacco, the nett amount of which (after deducting, as customary, one half of the expenses of cooperage) was \$17,311 92 cents, for which witness drew bills of exchange at sixty days sight, on William Parsons at Boston, all of which were paid, except two: to wit, one bill for \$1443 29 cents, and the other for \$4123 71 cents, which said two last bills were protested for non-acceptance and non-payment by the said Parsons. At the time witness went to said Armor to purchase said tobacco, he stated to said Armor that he was about to purchase the same on account of William Parsons, and that he would give bills on the said Parsons. Witness then showed said Armor the letters of said Parsons which refer to the order for purchasing tobacco for loading the Mary and Betsey: witness, on some occasions, would show letters of said Parsons to merchants in New Orleans from whom he was about making purchases, but did not show all said letters.

From the course of business between witness and said Parsons for the several years that he had been transacting business for said Parsons in New Orleans, their business had become generally known in said city; and from the great

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number of bills which witness had annually drawn on said Parsons, these bills had gained currency in the market of New Orleans, and he has no doubt that they were received by the several merchants who took them, under the firm conviction that Parsons would accept; at the time the purchase was made from Mr Armor in 1825, two vessels, the Mary and Betsey, belonging to said Parsons, were lying in the port of New Orleans, waiting for cargoes of tobacco, which witness had been instructed by said Parsons to purchase for him; witness purchased, in 1824, tobacco from James Armor for William Parsons, and which was paid for by drawing bills on said Parsons by witness, all of which were duly paid by William Parsons. The one hundred and eighty hogsheads of tobacco referred to were, after they were so purchased from James Armor, shipped on William Parson's account on board his vessels aforesaid to Europe. At the time, in August 1825, when William Parsons began to protest the bills of witness, he, witness, had on hand a quantity of steel belonging to said Parsons unsold, and had also sold iron, nails, &c. to a considerable amount, which was not then due, and which could not be applied to the purchases.

In the balance of \$11,631 23 cents against witness, as per account current in November 1824, were included some of witness's exchange on Mr Parsons, as witness had overdrawn the amount of purchases, having sustained a very heavy loss by the failure of A. Fiske, in 1822.

In the season of 1825, the purchases of witness for Mr Parsons, and the disbursements of his vessels, and the amount of drafts drawn after the rendition of accounts in November 1824, up to the close of operations in purchasing and drawing in 1825, will appear from correspondence and accounts. The amount of bills drawn in 1825, and which were protested by Mr Parsons, was about \$39,137 79 cents; witness, from his declarations, and the course of his business, must have been known as acting for Mr Parsons in these purchases of the merchants of New Orleans. The vessels of Mr Parsons had left the port of Orleans previous to any

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intelligence having been received at New Orleans of his protesting witness's bills.

Witness states that, when he made purchases, the bills of parcels were made out in witness's own name, and the accounts assured in the books of the different merchants in his name; that this is the usual manner in which bills of parcels are made out, and accounts kept in New Orleans, although it may be well known between the parties that the merchant who sells is selling the property of others on commission, and that he who buys is buying as the agent of another.

Witness had been instructed, as appears by the letters of Mr Parsons, to re-sell any tobacco not suited to the market to which Mr P. was shipping, when, in purchasing a lot, he, witness, should be obliged to take some of such quality; witness did accordingly re-sell a few hogsheads, which had been principally purchased from Bedford, Breedlove and Robeson. Captain Mayo was then here with the Mary. Witness, by his letters of the 1st of July 1825, informed Mr Parsons that he had purchased one hundred and forty hogsheads, which was stowed on the 7th of the same month, previous to which the tobacco had been weighed, and found to be only one hundred and thirty-two hogsheads. No reference was made to that of the 1st of July, as witness wrote, in haste, being about dispatching the Betsey and Mary. The information of Captain Mayo, as given to Mr Parsons, as appears from Mr Parsons's letters, that he, witness, was selling tobacco to the extent it was construed by Mr Parsons, as he states in his letters, was incorrect, as witness had only re-sold as before stated.

Cross-examined. Fiske was a commission merchant in New Orleans, and was the correspondent of Parsons, from whom he received goods on consignment for sale, and transacted his business exclusively in New Orleans, from the year 1821 to the month of July 1825; and in all purchases made by Fiske for Parsons, he, Fiske, received the accounts and transacted the business in his own name, and never signed his name as agent for Parsons.

EBEN FISKE.

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The whole correspondence between Mr Parsons and Eben Fiske was set forth at large in the record, commencing on the 19th of October 1821, and terminating on the 19th of November 1825.

The first letter from the plaintiff in error to Eben Fiske, was dated October 1, 1821; and the letter under the authority in which their transactions commenced, was dated October 19, 1821. Those letters were as follows:

Boston, October 1st, 1821.

MR EBEN FISKE,

Sir: I am sorry at any time, especially at the commencement of a correspondence with you, to request a favour, which you may think unpleasant, but hope you may be induced to comply with. My request is, that you would call on Messrs William and Nathaniel Wyer, for advice respecting a balance I have in their hands, but at my risk. You have above a copy of part of their letter to me, dated 27th February 1819; from that to the present day, I have not been able to get any reply from them to my letters on that subject. I wish you to call on them for an explanation; if they have received the money, please to receive it from them; if they have not, presuming you must know the person who purchased the steel, you can determine if it can ever be collected. I wish you to pursue such measures to have the debt collected, as if it was your own.

I enclose you a letter for Messrs Wyer: after reading, please to seal, and hand it to them.

I am, very respectfully, your humble servant,

WILLIAM PARSONS.

Boston, October 19th, 1821.

MR EBEN FISKE,

Sir: I am sorry I had not the pleasure of a personal interview with you, when you were in Boston; I received your letter. I have concluded to send the brig Betsey, John Virgin master, for New Orleans. She will probably sail next week; if you can purchase one hundred and fifty hogsheads of very good old tobacco, should there be any at market; one

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hundred bales of clean white Tennessee or Alabama cotton; and to fill up with good Campeachy logwood; the tobacco not to cost more than 4 or 4½ dollars, the logwood from 18 to 22 dollars; if higher than that, take only as much as will stow in breakage, and fill up with tobacco and cotton, one half each. If these articles can be procured, I wish it done at once: if the tobacco cannot be procured by the brig, I will give captain Virgin instructions to communicate to you what to load the vessel with. You will please draw on me for the funds to pay for the cargo.

I am, &c.

WILLIAM PARSONS.

October 20th. You will please to supply captain Virgin with his adventure, and take his draft on me for the amount, say ten or twelve hundred dollars, which shall be duly honoured, or charge me with the amount, in account; also furnish captain Virgin with the adventures for some others, and charge to account as above.

I am, respectfully, your humble servant,

WILLIAM PARSONS.

On the 9th of June and on the 8th of August 1825, the plaintiff in error wrote to Eben Fiske, as follows:

Boston, June 9, 1825.

MR EBEN FISKE,

Dear Sir: I have your favours of the 30th of April and 5th of May. I wish that your opinion may prove correct, and that tobacco may be at such a price that you may be able to load the Mary and Betsey. The Mary, from my letters to Captain Mayo and yourself, I think you will load, but fear the market in Gibraltar will not rise in proportion. From my last accounts, Mr Sprague was selling at \$7½ per cwt. The article in Gottenburg, late in April, was very dull, and had risen but a very trifle. If the Betsey cannot be loaded for Gottenburg, get a freight for her for New York or Boston, or any northern port. Apply all the funds you have, and which you say will be convenient for you to

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invest, to load the Mary. It will not answer to purchase for the Gibraltar and Gottenburg markets for another voyage, to stand at a higher rate than my limits. You may possibly be able to purchase two hundred hogsheads of very fine, not to go higher than 6½ cents. By purchasing late, you will be able to apply the proceeds of nails sold, which will then be due. As you have given me assurances that you will apply all my funds in your hands at that period, I cannot have any doubt on the subject.

The Betsey is insured in this city. The papers must be clear and regular, to recover from the underwriters. I enclose a letter for Captain Wallis, should he be with you, in conformity with what I write you. Your draft of the 6th of April, to John Clark, sixty days, for \$372 18.cents, without advice, has been paid.

I am respectfully, your humble servant,
WILLIAM PARSONS.

Boston, August 8, 1825.

MR EBEN FISKE,

Dear Sir: I wrote you on the 26th of July and 4th instant. I now enclose you an abstract of my account with you. From my letters to you the past season, you will readily perceive my determination to have my account settled with you this season. The payment for the one hundred and thirty-two hogsheads of tobacco you purchased to ship to Boston, I shall not accept for until I receive it myself, or by my agents. If, from any cause, it should not be shipped before you receive this, I request you to deliver it to Messrs Howard and Merry; also, any nails or steel you may have unsold, or the notes received for any nails or steel which are not paid for: also, Mrs Richards's note, a bad debt, for \$673 23 cents. Their receipt shall be evidence for me to pay any balance that may be due on settlement of the account. Your drafts not come to hand, to a larger amount than the last of the one hundred and thirty-two hogsheads of tobacco, will give you time to comply with the foregoing requisition from me.

I am, respectfully, your humble servant,
WILLIAM PARSONS.

SUPREME COURT.

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The letter advising of the drafts, which were the subject of the suit, was this following:

New Orleans, 2d of July, 1825.

WILLIAM PARSONS, Esq.

Sir: I have drawn on you this date; for three drafts, as follows, favour John Clark,

No. 42, for \$4123 71 cents, 60 days, three per cent discount, net \$4000.

No. 43, for \$1443 29 cents, 60 days, three per cent discount, net \$1400.

No. 44, for \$1631 75 cents, 60 days, three per cent discount, net \$1583.

The above are in place of exchange, advised under dates of yesterday, of the same numbers, and which by mistake were drawn for the net amount, instead of the gross. The same are destroyed.

I am, respectfully, your obedient servant,

EBEN FISKE.

Judgment was given for the plaintiffs in the circuit court, whereupon the defendant brought this writ of error.

Such of the facts and correspondence as were considered important, and which have been omitted in this statement, are referred to in the opinion of the court.

The errors assigned were :

1. Fiske was not the agent of Parsons, nor was he authorized to purchase on Parsons's account.

2. The merchandise was not in fact sold on the credit of Parsons, but on the credit of Fiske, or on the belief that Parsons would accept his bills.

3. The facts and correspondence do not show that Parsons was bound to accept the bills.

Mr Livingston and Mr Webster, for the plaintiff in error; after an examination of the facts of the case, contended: that the principle upon which the court below had proceeded, would make Parsons liable for all the bills drawn by Fiske in the course of his business in New Orleans. The

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real nature of the transactions between Fiske and the plaintiff were fully shown by the testimony of Fiske. It was a dealing between a factor and his principal; the principal being abroad and not known. In such a case the factor alone is liable. Paley on Agency, 257. 1 Bos. & Pul. 363. 3 Bos. & Pul. 489. Buller's *Nisi Prius*, 130. 4 Taunt. Rep. 574.

It is agreed that Armor can only make Parsons liable as a purchaser of the property. 2 Livermore, 199. If Fiske was the purchaser, Parsons was not liable.

Parsons could only be liable on one of two grounds; either that the original credit was given to him, or that Fiske was authorised to draw on him for the purchases specifically. These are not supported by the evidence.

An authority to draw gives a right to the holder of the bill as holder, not to the vendor of the goods as vendor, in payment of which the bill was given. Suppose Fiske had drawn two bills, one for the payment of the goods, the other for his own use. The refusal of Parsons to accept the bills would have made him liable to Fiske only.

The case of *Coolidge vs. Payson*, 2 Wheat. 66, decides that the drawer is liable to pay a bill after a particular promise to accept it. Cited also, *Shimmelpennick vs. Bayard*, 1 Peters, 264. The doctrine contended for, on the part of the plaintiff below, would render Parsons liable both to the vendor and to Fiske. To Fiske, by non-acceptance of the bill; to the vendor, for the goods. If both can recover there would be two concurrent creditors for the same debt; which is impossible, according to the cases cited: 15 East, 64.

The case is then one of factor and principal abroad; and the case in *Taunton* shows, that the situation of the foreign principal is not altered, whether or not the goods came to his hands.

There is nothing in the correspondence which will authorise the assertion, that there was a general direction to buy the particular property on bills. It is said Fiske was the general agent; we say he was the factor.

Mr Jones, for the defendant, argued; that there was evi-

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dence in the case sufficient to show that Fiske was the agent, and Parsons the principal in the transactions out of which the claims arose, and that Fiske had power to draw the bills.

A commission merchant may not be an agent, but their characters are perfectly consistent; and in the case before the court, the articles were not purchased on account of the agent, but for Parsons. If one is in the habit of purchasing for another, as Fiske was in this case, and so acting for four years; this is evidence of agency, in the absence of proof to show that it had ceased. Though the agent should exceed his private instructions, it would not affect those who deal with him as agent, or impair their claims on the principal.

In this case there is no complaint that the instructions were exceeded; the reason for not paying the bills was not this, but that a balance was due from the agent to the principal, and that he should have paid for the purchases out of funds in his own hands.

He had authorised Fiske to draw, without regard to the balance due to him.

Mr Justice JOHNSON delivered the opinion of the Court.

This cause is brought up by writ of error from the district court of Louisiana district, exercising circuit court jurisdiction, in a suit in which the cause of action was in the nature of a quantum valebat, for a quantity of tobacco sold; but according to the practice of that court, the suit was prosecuted in the forms of the civil law, and the judgment rendered by the court, the parties having waived the trial by jury. The record consists of the petition, the answer, the whole testimony, as well depositions as documents, introduced by either party, and the fiat of the judge that Armor, the plaintiff below, recover the debt as demanded.

In the argument, counsel considered the cause as in nature of a case stated, that is, a substitute for a special verdict; but this court could not avoid noticing that the precedent might involve it in the necessity of exercising jurisdiction over cases of a very different character. This writ of error does not bring up a mere statement of facts, but a

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mass of testimony, and however consistent and reconcilable the testimony may be in this case, it may be very different in future causes coming up from the same quarter, and by means of the same process.

The difficulty is to decide under what character we shall consider the present reference to the revising power of this court. If treated strictly as a writ of error, it is certainly not an attribute of that writ, according to common law doctrine, to submit the testimony as well as the law of the case to the revision of this court; and then there is no mode in which we could treat the case, but in the nature of a bill of exceptions; that is, to confine ourselves entirely to the question, whether, giving the utmost force to the testimony in favour of the party in possession of the judgment below, he was legally entitled to a judgment. But this would often lead this court to decide upon a case widely different from that acted upon in the court below. There may be conflicting testimony, and questions of credibility in the cause, which this court would be compelled to pass by. This would be increasing appellate jurisdiction on principles very different from the received opinions and judicial habits of that state; and it has been argued, equally inconsistent with the rights extended to them by congress.

We feel no difficulty from the bearing of the seventh amendment of the constitution in this case; because if this be a suit at common law in the sense of the amendment, the object was to secure a right to the individual, and that right has been tendered to him and declined. The words of the amendment are, "the right to the trial by jury shall be preserved." Nor are we at liberty to treat this as *an appeal* in a cause of equity jurisdiction under the act of 1803; because the party has not brought up his cause by appeal, but by writ of error.

The present case is one which may be treated as a bill of exceptions, or a case submitted; since, giving the utmost force to the testimony in favour of Armor, we are of opinion that the judgment must be reversed. We shall proceed, therefore, to examine the merits upon that principle, with-

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out committing ourselves either upon the extent of the appellate power of this court over that of Louisiana, or the appropriate means of exercising it.

The merits of this case may be comprised within the following state of facts :

Parsons was a merchant and considerable ship owner, established in Boston, and in the habit of trading to New Orleans. Eben Fiske was a commission merchant, established in New Orleans, with whom Parsons opened a correspondence on the 1st of October 1821, with a commission to call upon his previous correspondents, W. and N. Wyer, for a balance supposed to be in their hands. The transactions, in the course of which the purchase was made which constitutes the present cause of action, commenced with the letter of the 19th of October 1821 ; the tenor of which furnishes the true exposition of the nature and extent of the mandatory power under which Fiske acted for Parsons. The material passages are these :

"I have concluded to send the brig Betsey, John Virgin master, for New Orleans. She will probably sail next week. If you can purchase one hundred and fifty hogsheads of very good tobacco, should there be any at market, &c. If these articles can be procured, I wish it done at once, &c. You will please draw on me for the funds to pay for the cargo."

The examination of Fiske furnishes these further explanations of the relation in which he acted with regard to Parsons. In the latter part of his deposition he says, "he was the correspondent of Parsons, from whom he received goods on consignment, and transacted his business exclusively in New Orleans from the year 1821 to July 1825 ; and in all purchases by him for Parsons, received the accounts and transacted the business in his own name, and never signed his name as agent for Parsons ;" and further, "that when he made purchases, the bills of parcels were made out in his, Fiske's, name, and the accounts assured in the books of the different merchants in his name." And in the commencement of his deposition, he says, "that the general course of the transactions between them was, that the said Parsons sent out to New Orleans iron, steel, &c. consigned

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to witness, which he would sell as occasion offered, most frequently on credit. That the vessels of the said Parsons visited New Orleans every year; when witness, on account of said Parsons, purchased from the merchants of New Orleans tobacco, cotton, &c., and such articles as Parsons would request, which were put on board of Parsons' vessels, and on his account transported to different ports of Europe and America. To put himself in funds for these purchases so made, witness drew his bills of exchange on said Parsons, which had always been duly accepted and paid, until August 1825." "That witness would charge said Parsons with purchases made for him, as well as for the disbursements of his vessels and other expenses and charges, and would credit said Parsons with bills drawn on him from time to time, and the proceeds of nails, iron, steel, &c. as sold;" and then refers generally to the accounts annexed to the deposition for further explanations on the nature of their dealings.

By reference to these accounts it appears that the bills were disposed of generally at market as opportunity offered; and that he never acted under the idea of being restricted to the drawing of bills to pay the vendor in that mode, specifically, for each purchase.

With regard to the particular purchase under consideration; Fiske swears that the payment in bills made a part of the contract, and that the bills drawn were all paid except two, making up the balance here sued for. And it has been thought to have some influence upon the merits of plaintiff's demand, that at the time of this purchase, Fiske stated to Armor that he was about to purchase on account of Parsons, and showed him the letters of Parsons which refer to the order to purchase tobacco for loading the Mary and Betsey; for which object this purchase was made. How far the case of the plaintiffs below can be aided by those letters will presently be seen.

The simple question under this state of facts is, was Parsons chargeable to Armor as vendor of this parcel of tobacco? This must be decided either upon the general

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powers vested in Fiske, or the particular circumstances of this purchase.

The general rule is, that a principal is bound by the act of his agent no farther than he authorises that agent to bind him; but the extent of the power given to an agent is deducible as well from facts as from express delegation. In the estimate or application of such facts, the law has regard to public security, and often applies the rule, that "he who trusts must pay." So, also, collusion with an agent to get a debt paid, through the intervention of one in failing circumstances, has been held to make the principal chargeable on the ground of immoral dealing. To one or other of these heads all the cases are reducible; and into one or other of these classes it is necessary to bring the present case, or Parsons is not chargeable.

It has been argued, that Fiske was the general agent of Parsons, for the purchase of cargoes to load his vessels, and as such had power to bind him as original vendee to this plaintiff. That he possessed a general power to draw bills in payment for such cargoes, and was either bound to accept such bills, or became bound by colluding to create a credit to Fiske, which exposed the community to imposition.

But all this argument turns upon a misapprehension of the nature of the transactions between Parsons and Fiske.

Every one knows that a bill of exchange is the substitute for the actual transmission of money by sea or land. Power therefore to draw upon a house in good credit, and to throw those bills upon the market, is equivalent to a deposit of cash in the vaults of the agent. There is not the least title of evidence in the cause to show that Parsons meant to use the credit of Fiske, or to authorise him to pledge the credit of Parsons in any thing but the negotiation of bills. This depended on the confidence which merchants who wished to remit from New Orleans would place in the solvency and integrity of the drawer and drawee, and had no connection whatever with the application of the money thus raised to the purchases ordered by the principal. As to those purchases, the agent was authorized to go no farther

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than to apply the funds deposited with him. And the case is reduced to the plain and simple rule to be found every where, from the time of Shower and Lord Holt, down; "that if I give my servant money to purchase for me, and he use it, and purchase on credit, I am not bound, though the article come in fact to my use."

There are few, if any cases, to be found in modern English books on this subject; for the plain reason, that the nature and effects of such a commission or employment, are too well understood in that country to have admitted of litigation. All the cases which have arisen there of a recent date, except where the ground of collusion has been resorted to, are cases of purchases on credit. Such are those of Addison and Gandasequi, and some others that have been quoted. The case of *Wilson vs. Hart*, 7 Taunt. 295, was a case of collusion.

If, in the present case, Parsons were chargeable with any unfair dealing, or the practice of uncandid or collusive means of saving the balance for which it appears Fiske had overdrawn; it cannot be questioned that he is chargeable. But on this part of the case two considerations are important, the first of which relates to the amount of the bills which Parsons refused to accept, and the second, the particular notice communicated to Armor of the object and limits of Fiske's power to draw.

Of the general power to protest the bills of one who has overdrawn, there can be no question, for it is the only security which one who gives a power to draw bills and throw them on the market, or perhaps to draw at all, has against the bad faith of his correspondent. On this subject he takes the risk of paying the damages, if in fault, or of throwing them on the other, if he has actually abused his trust. It is a question between him and his correspondent.

It is true that in this case the amount protested appears to have gone far beyond the balance acknowledged by Fiske. But then Fiske held a large quantity of tobacco in store, which Parsons might very well suppose would not be given up to his order after protest of the bills; and in refusing payment to such an amount may have had in view an indemnity.

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against this further loss; a loss which actually was incurred; so that in this he is not chargeable with *mala fides*.

The second consideration is equally important in its bearing upon this part of the case.

Parsons, in his correspondence, alleges as his justification for refusing acceptance, that he had limited Fiske in his purchases for the Mary and Betsey, to the application of the *funds in his hands*. The balance due on general account by a correspondent is, in mercantile language, a fund in his hands; and so the correspondence shows that it was understood to be in this instance. Fiske swears, that, at the time of the purchase from Armor, he showed Armor the letters from Parsons, on the subject of the purchase of the cargo for the Mary and Betsey, and by referring to the letters of the 9th of June and 5th of July 1825, which must be here meant, we find both expressly referring to the application of "funds in hand," and the latter intimating that the whole purchase will scarcely absorb "all the funds in hand."

So direct an intimation that the purchase of these cargoes was to balance the accounts between them, removes all ground for imputing collusion to parties.

As to the currency given to these bills by the regular acceptance and payment of them up to the date of the bills; if this is to deprive a merchant of the only check he has for his security, by preventing him from ever refusing his acceptance, credit would become a misfortune.

Nor does it affect the merits of this cause, that the original contract was made for a payment in bills. Such was not the negotiation to which Parsons had limited Fiske; it was no more, as between Parsons and Armor, than a purchase of bills, with the cash received for the tobacco; and a purchase against which Armor was not without a warning, furnished by the letters which Fiske, his own witness, swears he submitted to Armor, prior to the negotiation. It was creating new funds for a purchase, not purchasing with the funds already created, or in the hands of Fiske.

Judgment reversed.

THE BANK OF THE COMMONWEALTH OF KENTUCKY vs. WISTAR,
PRICE, AND WISTAR.

Where the clerk of the court had omitted to enter the judgment of this court, allowing to the defendant in error, on the affirmance of the judgment of the circuit court, interest at the rate of six per centum per annum as damages, and the mandate of this court, although issued, had not been presented to the circuit court; the court ordered the judgment to be reformed, allowing interest at the rate of six per cent. The omission is a mere clerical error.

It is a rule of this court, that where there are no special circumstances, six per cent. interest is allowed upon the amount of the judgment, in the court below. Under special circumstances, damages to the amount of ten per cent are allowed.

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Mr Vinton moved to amend the judgment of this court rendered in this cause at the January term of 1829; 2 Peters, 318; by giving to the defendants in error, damages on the judgment at the rate of six per centum per annum, and that the judgment of the court be so reformed.

Mr Vinton stated, that the mandate, though issued, had never been presented to the circuit court, and it was now in this court. Under these circumstances, and as the omission was a mere clerical error, he hoped the motion would prevail.

Mr Bibb, for the plaintiffs in error, objected to the amendment being made, as the whole subject was res adjudicata at the last term; and was not now to be opened. The mandate is a solemn act of the court; it passes under the view of the court, and is the proceeding of the court. The omission it is asked to correct was not a clerical misprison. If, in the course of adjudication in this court, an act of congress should not have been adverted to, would the court, at a subsequent term, open their judgment to correct the error which existed from their disregard of the act? The rules of court are not of higher sanction; and if in the issuing of the mandate that rule which allows interest has not been applied, the court will not go back to reform what has pass-

[Bank of Kentucky *vs.* Wistar et al.]

ed into judgment. Such a proceeding would expose the court and suitors to great inconvenience, and be productive of frequent injustice.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

In the case of the motion to amend the mandate, the court directs the amendment to be made, and the judgment of the court to be reformed, allowing interest at the rate of six per cent. The reason is, that by a rule of this court, when there are no special circumstances, six per cent. interest is allowed upon the amount of the judgment in the court below; under special circumstances, damages to the amount of ten per cent. are awarded by the court. The omission is deemed by this court a mere clerical error.

On consideration of the motion made by Mr Vinton, of counsel for the defendants in error, in this cause, on a prior day of this term, to amend the judgment of this court rendered in this cause at the January term of this court in the year of our Lord 1829: to wit, on the 14th day of February of the said last mentioned year, by giving to the defendants in error in said cause on said judgment damages at the rate of six per centum per annum: it is ordered and adjudged by this court that the said judgment of this court of February 14, A. D. 1829, be reformed by the amendment of damages at the rate of six per centum per annum, so that the judgment read thus: "it is adjudged and ordered by this court that the judgment of the said circuit court in this case be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

WILLIAM PARSONS, PLAINTIFF IN ERROR vs. BEDFORD, BREEDLOVE, AND ROBESON, DEFENDANTS.

This action was instituted in the district court of the United States for the eastern district of Louisiana, according to the forms of proceedings adopted and practised in the courts of that state. The cause was tried by a special jury, and a verdict was rendered for the plaintiff. On the trial, the counsel for the defendant moved the court to direct the clerk of the court to take down in writing the testimony of the witnesses examined in the cause, that the same might appear on record: such being the practice of the state courts of Louisiana; and which practice the counsel for the defendant insisted was to prevail in the courts of the United States, according to the act of congress of the 26th of May 1824; which provides, that the mode of proceeding in civil causes, in the courts of the United States established in Louisiana, shall be conformable to the laws directing the practice in the district court of the state, subject to such alterations as the judges of the courts of the United States should establish by rules. The court refused to make the order, or to permit the testimony to be put down in writing; the judge expressing the opinion, that the courts of the United States are not governed by the practice of the courts of the state of Louisiana. The defendant moved for a new trial, and the motion being overruled, and judgment entered for the plaintiff on the verdict, the defendant brought a writ of error to this court.

Under the laws of Louisiana, on the trial of a cause before a jury, if either party desires it, the verbal evidence is to be taken down in writing by the clerk, to be sent to the supreme court, to serve as a statement of facts in case of appeal; and the written evidence produced on the trial is to be filed with the proceedings. This is done to enable the appellate court to *exercise the power of granting a new trial, and of revising the judgment of the inferior court.* Held that the refusal of the judge of the district court of the United States to permit the evidence to be put in writing, could not be assigned for error in this court, the cause having been tried in the court below, and a verdict given on the facts by a jury; if the same had been put in writing, and been sent up to this court with the record, this court, proceeding under the constitution of the United States, and of the amendment thereto, which declares, "*no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law,*" is not competent to redress any error by granting a new trial.

The proviso in the act of congress of the 26th of May 1824, ch. 181, demonstrates that it was not the intention of congress to give an absolute and imperative force to the state modes of proceeding in civil causes in Louisiana, in the courts of the United States; for it authorizes the judge to modify them ~~so as~~ to adapt them to the organization of his own courts; and it further demonstrates that no absolute repeal was intended of the antecedent modes of proceeding authorized in the United States courts, under former acts of congress; for it

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leaves the judge at liberty to make rules, by which discrepancy between the state laws and the laws of the United States may be avoided. [444]

The act of congress having made the practice of the state courts the rule for the courts of the United States in Louisiana, the district court of the United States in that district is bound to follow the practice of the state; unless that court had adopted a rule superseding the practice. [445]

Generally speaking, matters of practice in inferior courts do not constitute subjects upon which errors can be assigned in the appellate court. [445]

The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the union. [446]

By "common law," the framers of the constitution of the United States meant, what the constitution denominated in the third article, "law;" not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were regarded, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit. [447]

The amendment to the constitution of the United States, by which the trial by jury was secured, may, in a just sense, be well construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. [447]

It was not the intention of congress, by the general language of the act of 1824, to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial by a re-examination of the facts tried by a jury; and to enable it, after trial by jury, to do that, in respect to the courts of the United States sitting in Louisiana, which is denied to such courts sitting in all the other states of the union. [447]

No court ought, unless the terms of an act of congress render it unavoidable, to give a construction to the act which should, however unintentional, involve a violation of the constitution. The terms of the act of 1824 may well be satisfied by limiting its operation to modes of practice and proceeding in the courts below, without changing the effect or conclusiveness of the verdict of a jury upon the facts litigated on the trial. The party may bring the facts into review before the appellate court, so far as they bear upon questions of law, by a bill of exceptions. If there be any mistake of the facts, the court below is competent to redress it, by granting a new trial. [447]

ERROR to the eastern district of Louisiana.

This suit was originally brought in the parish court of New Orleans by the defendants in error, by a petition for an attachment against the property of the defendant in the suit; and was removed into the district court of the United States for the eastern district of Louisiana, the defendant being a citizen of the state of Massachusetts.

The object of the suit was the recovery of the amount of certain sales of tobacco, made by the plaintiffs to a certain

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Eben Fiske, represented in the petition to be the agent and factor of the defendant; and for which he drew bills of exchange on the defendant, and which bills were refused acceptance and payment. After an answer had been filed, the case was submitted to a special jury, and a verdict was rendered for the plaintiffs for \$6414.

The proceedings in the case were instituted and conducted according to the laws of Louisiana, which conform in a great degree to the principles and practice of the civil law.

On the trial, the plaintiffs produced the bills of exchange mentioned in the petition, and many letters written by the defendant to Fiske. The defendant introduced, as testimony, other letters written as above; and also the record of a suit brought by the plaintiffs against Fiske, on the same bills, in which they charge, on oath, that *the sale was made to Fiske*, and that he was their debtor; all which written testimony was, according to the practice of the state courts, filed in court, and forms part of the record.

The plaintiffs also produced Fiske as a witness, to prove that he acted only as agent for the defendant, and to make him a witness, gave a full release of all claims on him. He was objected to; but the court overruled the objection, and a bill of exceptions was tendered and signed.

By the twelfth section of an act of the general assembly of Louisiana, passed the 20th of July 1817, entitled an act "to amend the several acts passed to organize the court of the state, and for other purposes," it is among other things enacted, "that when any cause shall be submitted to a jury to be tried, the verbal evidence shall, in all cases where an appeal lies to the supreme court, if either party require it, and at the time when the witnesses shall be examined, be taken down in writing by the clerk of the court, in order to be sent up to the supreme court, to serve as a statement of facts in case of appeal; and the written evidence produced by both parties shall be filed with the proceedings."

By a law of the United States, passed the 26th of May 1824, the mode of practice pursued in the state courts is directed to be followed in the courts of the United States in Louisiana.

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Under the provisions of these laws, the defendant applied to the court to direct the clerk to take down the verbal proof offered in the cause, or to suffer his counsel, the counsel of the plaintiffs, or the witnesses, to take it down; which the judge refused to do: whereupon a bill of exceptions was tendered and signed.

A motion was made for a new trial, which was overruled; and a judgment was entered for the amount of the verdict. This writ of error was then prosecuted.

The plaintiff in error contended:

1. That from the facts apparent on the record, the plaintiffs had no right of action against the defendant, and that therefore this court will decree a judgment to be entered in favour of the defendant.

2. The court will, at least, reverse this judgment, and award a new trial, for one or all of the following reasons:

1. Because the court refused the evidence to be put upon the record.

2. Because the whole question was a question of law, and the decision was against law.

3. It is not, strictly, a common law proceeding, but a proceeding under the peculiar system of Louisiana; and, according to that system, the court has power to reverse the judgment, under circumstances which would not give it that power when the trial had been according to the common law.

The case was argued by Mr Livingston and Mr Webster for the plaintiff in error, and by Mr Jones for the defendants.

Mr Livingston and Mr Webster, for the plaintiff in error.

The law of Louisiana, of July 1817, directs that in all jury trials, the verbal evidence shall be reduced to writing, and put on record. The law of congress of the 6th of May 1824, directs that the practice in the courts of the United States, in the state of Louisiana, shall be according to the rules of practice in the state courts. Before the law of the United States of 1803, all causes came up to this court by writ of error. Under the authority of this law, cases of admiralty and of equity jurisdiction came up by appeal, and

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all cases not embraced by the provisions of the law, are yet brought up by writ of error.

The constitution of the United States says, "all controversies" between citizens of different states may come to this court; and by the provisions of the law of 1789, the removal of such cases is to take place when the matter in dispute amounts to two thousand dollars. That law requires a statement of the evidence in appeals, and in matters of admiralty jurisdiction. It cannot be supposed that there was any intention to exclude cases such as the present from the jurisdiction of this court. It has been the practice for twenty years, ever since the organization of the courts of the United States in the state of Louisiana, to bring cases up from that district.

The proceedings in the courts of Louisiana are by petition and answer. To introduce the practice of the common law into any of the courts established in that state, would be against the feelings and wishes of the whole people of the state. The judges of the courts of the United States have adopted the practice of the courts of the state. The position of any one who should come from a state where the common law is not known, as from Louisiana, and who should be required to argue a cause on the common law alone, in this court, would be extraordinary.

The twenty-second section of the judiciary law of 1789 says, the supreme court shall not reverse a judgment for error in fact. But it is claimed, that the seventh amendment of the constitution of the United States, which declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law," was not intended to take away a remedy which was secured by a law of the state of Louisiana; and which law is in force in the courts of the United States, under the provisions of the act of congress of 1824.

This case cannot come within the amendment. It is a case not comprehended by it, nor can it have any application to it. The amendment was adopted when all the proceedings in the courts of the United States, and in the courts of

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the different states, were under the common law; and the plaintiff in this case has a complete remedy, independent of the amendment. It was intended to guard the rights of citizens, proceeding according to the common law; and it only provides that the decisions of juries shall not be set aside except according to the common law. How can it apply or operate in a state where there is no common law, where the forms of proceeding under the common law are not known or permitted? Where terms are used which embrace the case, and justice requires it, the law must be construed to embrace it. A constitutional law of the United States gives the relief the plaintiff asks in this case: the amendment of the constitution referred to does not take it away.

There is a rule of the common law, the effect of which gives the same remedy as to parties as that which is required here; and in this case the equivalent remedy would have been furnished, had the court directed the clerk to take down in writing the testimony given in this cause. By the common law practice, all evidence may be stated under a bill of exceptions, or the judge may be called upon to charge on the law and facts; the facts being stated from which the law is supposed to arise. The proceedings in the courts of Louisiana are substituted for these common law proceedings. They should have the same estimate, and be treated in the higher court in the same manner as a bill of exceptions. It is admitted that in the court below, the case must proceed according to the state laws: those laws say, the evidence shall be put in writing by the clerk. The refusal to permit the clerk to do this was certainly error.

If the laws of the state are not to be the guide, we had better have no right of appeal from the courts of Louisiana to this court. If those laws do not furnish rules of proceeding, we have no appeals in cases where appeals may come from other states. Because, in the courts of Louisiana there is no distinction between common law and equity; and there cannot be one rule in a state court, and another in a federal court. The principle that no relief shall be given in equity where there is a plain remedy at law, would interfere mate-

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rially with proceedings in the courts of Louisiana. In every possible case relief is given by a court of law in Louisiana; and the distinction between law and equity is not there known. To insist on the establishment of the distinction in the courts of the United States there, would be productive of grievous injury. It would give a foreigner one rule of practice and a citizen another. If the forms of the common law must be pursued to secure writs of error and appeals from the courts of the United States in Louisiana to this court, all the system of practice now prevailing in those courts, under the authority of the law of 1824, must be changed. The forms of the common law, the distinctions between proceedings at law and in equity, must be established there. This will be productive of great inconvenience, and will have other injurious effects.

Putting the evidence in writing was very important to the defendant below, as he could have demurred; and then this court would have had the whole of the evidence before them.

Mr Jones, for the defendant in error.

Where a local practice, such as that of Louisiana, is adapted only to state courts, and not to the courts of the United States, it will not extend to the latter courts. The supreme court of the state of Louisiana may know and examine the facts which have been reduced to writing on the trial of causes in the inferior courts, and decide whether a new trial should not have been granted. But no such power exists in this court. It has no power to look into the facts of the case tried by a jury, only for the purpose of deciding on the law arising on the evidence; and this, when they are properly before the court, but not for the purpose of drawing a conclusion from the facts, different from that of the jury. The judiciary law excludes matters of fact from this court, unless in equity and admiralty causes. This court will never decide on questions of fact; never on a question of new trial, or not; and the only possible use of putting the evidence in writing, in this case, would have been to present the question of a new trial. This court takes no cognizance of any fact, sitting as a court of common law. A compliance or

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non-compliance of the court below with the defendant's prayer, could neither affect the judgment of the court below, or of this court; the judgment here must be the same, whether the evidence was recorded or not. There was therefore no error of which this court can take notice in the proceedings below. The proceedings are said not to be according to the common law, but to the law of Louisiana, which is said to differ from the common law; and yet we find the trial by jury established, which is the great foundation and first principle and essence of a common law trial, be the forms of the process what they may. Trial by jury carries with it all the incidents of a common law trial. The verdict of the jury upon the facts is conclusive in every court, unless set aside by the court before which the cause was tried.

This court will not reverse all its functions, because the courts of the United States in Louisiana adopt the state practice. The judiciary act says, all trials in issues of fact, shall be by jury; this court will not say, as a rule of practice, there shall be no trial by jury according to the principles of the common law in the courts of the United States of Louisiana. As Louisiana has adopted the trial by jury, it must have all its attributes in that state.

The purpose and meaning of the twenty-second section of the judiciary act, was to exclude this court in all cases from deciding on a question of fact. Error in fact, means an error in deciding on a question of fact. The difference between a writ of error and an appeal is very familiar. Appeals, ex vi termini, mean, the bringing up of every matter pending in the court below. A writ of error only reaches errors of law, and has nothing to do with questions of fact.

If the law of 1824 imposed on the court the duty of recording the parol evidence, is it assignable for error? Could it by any possibility have varied the judgment of the court below, or of this court? If it could not, there can be no cause of reversal, as no injury has been done to the plaintiff in error. This court will not visit the party with a reversal of the judgment of the district court, when in the judgment there is no error; although they may compel the court below to record the evidence.

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Mr Justice STORY delivered the opinion of the Court.

This is a writ of error to the district court of the United States for the eastern district of Louisiana.

The facts disclosed on the record are substantially as follows:

The suit was originally commenced by an attachment, brought in the parish court of New Orleans, and removed, on the petition of defendant, into the district court of the United States for the eastern district of Louisiana : the plaintiffs being citizens of Louisiana, and the defendant a citizen of Massachusetts.

The petition of the plaintiffs set out the ground of their action to be certain sales of tobacco, made by them to one Eben Fiske, as the factor and agent of the defendant, and for his account, at New Orleans, in June and July 1825 ; and certain bills of exchange drawn in their favour by Fiske at New Orleans, on the defendant at Boston, at several dates from the 2d to the 20th of July 1825, for the amounts of such sales. The defendant's answer (filed in the district court after the removal of the cause from the parish court) contains a general traverse of the allegations of the plaintiffs' petition, and tenders an issue, tantamount to the general issue of *nil debet*. The answer concludes with a petition of reconvention for ten thousand dollars damages. Upon this issue the cause was tried in the district court, by consent of parties, before a special jury, in March 1826, and a verdict passed against the defendant; who moved the court for a new trial ; which motion was overruled by the court, and final judgment rendered on the verdict against the defendant, who thereupon sued out this writ of error. The record presents two bills of exceptions on the part of the defendant, now plaintiff in error.

First bill of exceptions. Fiske, having first received from the plaintiffs a full and absolute release (which recites that the plaintiffs had dealt with him as the factor and agent of the defendant, and upon the credit and responsibility of the latter alone,) from all liability to them on the contract of sale and as drawer of the bills, was produced as a witness on the part of the plaintiffs to prove that he had purchased the

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tobacco as agent for the defendant. An objection on the part of the defendant to the competency of Fiske, on the ground of interest, was overruled by the court.

Second bill of exceptions. The defendant moved the court to direct the clerk of the court to take down in writing the testimony of the several witnesses examined by the respective parties, in order that the same might appear of record; such being the practice of the several courts of the state of Louisiana, according to the constitution and laws thereof, and such being the rule of practice, in the opinion of the counsel for defendant, to be pursued in this court, according to the act of congress of the 26th of May 1824. But the clerk refused, &c., and the court refused to order the clerk to write down the same, or to permit the witnesses themselves, the counsel for either of the parties, or any other person, to write down such testimony; the court expressing the opinion that the court of the United States is not governed by the practice of the courts of the state of Louisiana.

No charge or advice whatever was given or asked from the court to the jury on any matter of law or fact in the case: nor was any question whatever raised of the competency or admissibility of such evidence, other than the specific exception before taken to the competency of Fiske, on the sole objection of interest; the substance of the facts proved by him being in no manner drawn in question- before the court.

The record sets out all the documentary evidence; all of which appears to have been admitted by both parties. This consists of the protested bills above mentioned, with an admission upon the record by the defendant, that they had been regularly returned under protest to the plaintiffs, and that plaintiffs were, at the time the suit was commenced, the holders and owners of the same: and of a series of defendant's letters to his agent Fiske, from the 26th of March 1823 to the 10th of August 1825, containing evidence that Fiske, during all that time, was settled at New Orleans, and was the factor and agent of the defendant, there to receive shipments of cargoes from Boston for the New Orleans market, and to purchase and ship from the latter place to the

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defendant at Boston, cargoes of cotton and tobacco, for which he was authorised to draw bills on Parsons at Boston.

Upon the argument in this court the first bill of exceptions has been abandoned as untenable, and in our judgment upon sound reasons.

The second bill of exceptions is that upon which the court is now called upon to deliver its opinion.

By the act of Louisiana of the 28th of January 1817, section 10, it is provided, that in every case to be tried by a jury, if one of the parties demands that the facts set forth in the petition and answer should be submitted to the jury to have a special verdict thereon, both parties shall proceed, before the swearing of the jury, to make a written statement of the facts so alleged and denied, the pertinency of which statement shall be judged of by the court, and signed by the judge; and the jury shall be sworn to decide the question of fact or facts so alleged and denied, and their verdict or opinion thereof shall be unanimously given in open court, &c. and be conclusive between the parties as to the facts in said cause, as well in the court where the said cause is tried, as on the appeal, and the court shall render judgment; provided, that the jury so sworn shall be prohibited to give any general verdict in the case, but only a special one on the facts submitted to them. This section points out the mode of obtaining a special verdict, in the sense of the common law. The twelfth section then provides, that when any cause shall be submitted to the court or to a jury without statements of facts, as is provided in the tenth section of the act, the verbal evidence shall in all cases where an appeal lies to the supreme court of the state, if either party requires it, and at the time when the witnesses shall be examined, be taken down in writing by the clerk of the court, in order to be sent up to the supreme court, *to serve as a statement of facts in case of appeal*; and the written evidence produced on the trial shall be filed with the proceedings, &c. &c. The object of this section is asserted to be to enable the appellate court in cases of general verdicts, as well as of submissions to the court, to exercise the power of granting a new trial, and revising the judgment of the inferior court.

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It seems to be a substitute for the report of the judge who sat at the trial, in the ordinary course of proceedings at the common law.

Of itself, the course of proceeding under the state law of Louisiana could not have any intrinsic force or obligation in the courts of the United States organized in that state: but by the act of congress of the 26th of May 1824, ch. 181, it is provided that the mode of proceeding in civil causes in the courts of the United States that now are or hereafter may be established in the state of Louisiana, shall be conformable to the laws directing the mode of practice in the district courts of the said states; provided, that the judge of any such court of the United States may alter the times limited or allowed for different proceedings in the state courts, and make by rule such other provisions as may be necessary to adapt the laws of procedure to the organization of such court of the United States, and to avoid any discrepancy, if any such should exist, between such state laws and the laws of the United States.

This proviso demonstrates, that it was not the intention of congress to give an absolute and imperative force to the modes of proceeding in civil causes in Louisiana in the court of the United States; for it authorises the judge to modify them, so as to adapt them to the organization of his own court. It further demonstrates, that no absolute repeal was intended of the antecedent modes of proceeding authorised in the courts under the former acts of congress, for it leaves the judge at liberty to make rules by which to avoid any discrepancy between the state laws and the laws of the United States; and what is material to be observed, there is no clause in the act pointing in the slightest manner to any intentional change of the mode in which the supreme court of the United States is to exercise its appellate power in causes tried by jury, and coming from the courts of the United States in Louisiana; or giving it authority to revise the judgments thereof in any matters of fact, beyond what the existing laws of the United States authorised.

Whether the district court in Louisiana had adopted any rules on this subject, so as to modify or suspend the opera-

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tion of the Louisiana state practice, in relation to the taking down the verbal testimony of witnesses, does not appear upon this record. The court expressed an opinion, "that the court of the United States is not governed by the practice of the courts of the state of Louisiana;" and this would be correct, if, in the particular complained of, the court had adopted any rule superseding that practice. If no such rule had been adopted, the act of congress made the practice of the state the rule for the court of the United States. Unless, then, such a special rule existed, the court was bound to follow the general enactment of congress on the subject, and pursue the state practice.

But, admitting that the decision of the court below was wrong, and that the party was entitled to have his testimony taken down in the manner prayed for; still it is important to consider, whether this is such an error as can be redressed by this court upon a writ of error.

Generally speaking, matters of practice in inferior courts do not constitute subjects upon which error can be assigned in the appellate court. And unless it shall appear that this court, if the omitted evidence had been before it on the record, would have been entitled to review that evidence, and might, if upon such review it had deemed the conclusion of the jury erroneous, have reversed the judgment and directed a new trial in the court below; there is no ground upon which the present writ of error can be sustained.

It was competent for the original defendant to have raised any points of law growing out of the evidence at the trial, by a proper application to the court; and to have brought any error of the court in its instruction or refusal, by a bill of exceptions, before this court for revision. Nothing of this kind was done or proposed. No bill of exceptions was tendered to the court; and no points of law are brought under review. The whole object, therefore, of the application to record the evidence, so far at least as this court can take cognizance of it, was to present the evidence here in order to establish the error of the verdict in matters of fact. Could such matters be properly cognizable in this court upon the present writ of error? It is very certain that they

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could not upon any suit and proceedings in any court of the United States, sitting in any other state in the union than Louisiana.

The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares, that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law." At this time there were no states in the union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no states were contemplated, in which it would not exist. The phrase "common law," found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution had declared, in the third article, "that the judicial power shall extend to all cases in *law and equity* arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority," &c. and to all cases of *admiralty and maritime jurisdiction*. It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at com-

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mon law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By *common law*, they meant what the constitution denominated in the third article "law;" not merely suits, which the *common law* recognized among its old and settled proceedings, but suits in which *legal rights* were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. Probably there were few, if any, states in the union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And congress seems to have acted with reference to this exposition in the judiciary act of 1789, ch. 20, (which was contemporaneous with the proposal of this amendment); for in the ninth section it is provided, that "the trial of issues in fact in the *district courts* in all causes, except civil causes of *admiralty and maritime jurisdiction*, shall be by jury;" and in the twelfth section it is provided, that "the trial of issues in fact in the *circuit courts* shall in all suits, except these of *equity*; and of *admiralty and maritime jurisdiction*, be by jury;" and again, in the thirteenth section, it is provided, that "the trial of issues in fact in the *supreme court* in *all actions at law* against citizens of the United States, shall be by jury."

But the other clause of the amendment is still more important; and we read it as a substantial and independent clause. "No fact tried by a jury shall be otherwise re-examinable, in any court of the United States, than according to the rules of the common law." This is a prohibition to the

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courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings. The judiciary act of 1789, ch. 20, sec. 17, has given to all the courts of the United States "power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law." And the appellate jurisdiction has also been amply given by the same act (sec. 22, 24) to this court, to redress errors of law; and for such errors to award a new trial, in suits at law which have been tried by a jury.

Was it the intention of congress, by the general language of the act of 1824, to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial by a re-examination of the facts tried by the jury? to enable it, after trial by jury, to do that in respect to the courts of the United States, sitting in Louisiana, which is denied to such courts sitting in all the other states in the union? We think not. No general words, purporting only to regulate the practice of a particular court, to conform its modes of proceeding to those prescribed by the state to its own courts, ought, in our judgment, to receive an interpretation which would create so important an alteration in the laws of the United States, securing the trial by jury. Especially ought it not to receive such an interpretation, when there is a power given to the inferior court itself to prevent any discrepancy between the state laws and the laws of the United States; so that it would be left to its sole discretion to supersede, or to give conclusive effect in the appellate court to the verdict of the jury.

If, indeed, the construction contended for at the bar were to be given to the act of congress, we entertain the most serious doubts whether it would not be unconstitutional. No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a vio-

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lation, however unintentional, of the constitution. The terms of the present act may well be satisfied by limiting its operation to moves of practice and proceeding in the court below, without changing the effect or conclusiveness of the verdict of the jury upon the facts litigated at the trial. Nor is there any inconvenience from this construction; for the party has still his remedy, by bill of exceptions, to bring the facts in review before the appellate court, so far as those facts bear upon any question of law arising at the trial; and if there be any mistake of the facts, the court below is competent to redress it, by granting a new trial.

Our opinion being that, if the evidence were now before us, it would not be competent for this court to reverse the judgment for any error in the verdict of the jury at the trial; the refusal to allow that evidence to be entered on the record is not matter of error, for which the judgment can be reversed. The judgment is therefore affirmed, with six per cent damages and costs.

Mr Justice M'LEAN, dissenting.

This cause was removed from the district court of Louisiana by a writ of error; and a reversal of the judgment is prayed for, on the errors assigned.

The suit was originally brought in the parish court of the parish of New Orleans, and was removed to the district court of the United States, which exercises the powers of a circuit court.

In their petition, the plaintiffs below state that one Eben Fiske, as agent at New Orleans for William Parsons, the defendant, residing at Boston, purchased from the plaintiffs large quantities of tobacco, and drew bills on the defendant in payment, which he refused to honour. The plaintiffs claim 10,000.

The defendant, in his answer, denies the material facts set forth in the petition. A jury was impanelled, and a verdict rendered for \$6484. On the trial, the bills of exchange were produced, and a great number of business letters between Parsons and Fiske were read.

Fiske was sworn as a witness, though objected to on the

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ground of interest; but a release removed the objection to his competency.

The first assignment of error relied on is, that from the facts apparent on the record, the plaintiffs had no right of action against the defendant, and that therefore this court will decree a judgment to be entered in favour of the defendant.

2. That they will, at least, reverse this judgment, and award a new trial, for one of the following reasons:

1. Because the court refused to direct the evidence to be put upon the record.

2. Because the whole question was a question of law, and the decision was against law.

3. It is not strictly a common law proceeding; but a proceeding under the peculiar system of Louisiana; and according to that system, the court has power to reverse the judgment, under circumstances which would not give it that power where the trial had been according to the common law.

As this cause involves a constitutional question, which has not been settled by this court, and as I am so unfortunate as to differ in opinion with a majority of the members of the court, I shall, with great deference, present my views of the case.

In the state of Louisiana, the principles of the common law are not recognized; neither do the principles of the civil law of Rome furnish the basis of their jurisprudence. They have a system peculiar to themselves, adopted by their statutes, which embodies much of the civil law, some of the principles of the common law, and, in a few instances, the statutory provisions of other states. This system may be called the civil law of Louisiana, and is peculiar to that state.

The modes of proceeding in their courts are more nearly assimilated to the forms of chancery than to those of the common law. The plaintiff files his petition, in which he sets forth the ground of complaint and the relief prayed for. Process issues against the defendant; and when he is in court, he is ruled to answer the bill. The answer is filed, in which he admits, denies, or avoids the facts set forth in the petition,

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the same as in a suit in chancery ; and he is permitted, in his answer, to set up a demand against the plaintiff, which he may recover if sustained.

When the cause is brought to a hearing, the court decides the facts and the law, if neither party requires a jury. The testimony is taken down at the trial, and either party may move for a new trial, or take an appeal to the superior court.

If an appeal be taken, the testimony forms a part of the record, and is re-examined by the appellate court. Either party has a right to require a jury in the inferior court, and also to demand that the testimony be taken down at the trial ; so that it may form a part of the record, and be considered by the appellate court, should an appeal be taken.

If either party desires what is called in the statute a special verdict, each party makes a statement of facts, which exhibit the grounds of controversy ; and these statements are submitted to the jury with the testimony in the case. In this case, also, if either party requires it, the testimony must be taken down at the trial.

The facts found by the jury are examined by the appellate court, and its judgment is given on the facts without the intervention of a jury.

Such is the outline of the course of practice in the courts of Louisiana. A court of chancery there is as little known, and the rules of its proceedings as little regarded, as are those of a court of common law. Redress is sought in substantially the same manner for an injury done to the person, his property or character. Whether he seeks to recover a debt, or asks the specific execution of a contract, or to avoid a contract on the ground of fraud or accident, the mode of proceeding is the same ; he files his petition, and the defendant must answer.

In thus repudiating the forms and principles of the common law, the state of Louisiana has pursued a course different from her sister states. This has resulted from the views of jurisprudence derived by the great mass of her citizens from the foreign governments with which they were recently connected.

It is no doubt a wise policy to adapt the principles of

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government to the moral and social condition of the governed. This is no less true in a judicial than it is in a political point of view ; and where an intelligent people possess the sovereign power, they will not fail to secure this first object of a good government.

By an act of congress of the 26th of May 1824, it is provided that the mode of proceeding in civil causes in the courts of the United States, that now are, or hereafter may be established in the state of Louisiana, shall be conformable to the laws directing the mode of practice in the district courts of the said state : provided, that the judge of any such court of the United States may alter the times limited or allowed for different proceedings in the state courts, and make, by rule, such other provisions as may be necessary to adapt the said laws of procedure to the organization of such court of the United States, and to avoid any discrepancy, if any such exist, between such state laws and the laws of the United States.

There is no evidence before the court that the power given to the district judge in this proviso has been exercised : the first part of the section, which adopts in the district court of the United States the same mode of proceeding in civil actions as is established in the courts of the state, must therefore be considered as in force. And until this power be exercised, this section is a virtual repeal of so much of the judiciary act of 1789, and all other acts prior to 1824, which came within its provisions. It is contended, that whatever may be the rules of practice in the district court of Louisiana, they do not confer jurisdiction on this court. The force of this objection is admitted.

Any law regulating the practice of an inferior court does not confer jurisdiction on an appellate court ; but where such court has jurisdiction of the case, it must be governed in its decision by the rules of practice in the court below.

This court has jurisdiction by writ of error to revise the final judgment, in any civil action, of a circuit court of the United States where the matter in controversy exceeds two thousand dollars. Whether this judgment be obtained by the forms of the civil or the common law is immaterial.

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The only essential requisites to give jurisdiction are, that it be a civil action, involving a matter in controversy exceeding two thousand dollars; and that the judgment be final.

The forms of proceeding adopted under the Louisiana practice, in the district court, constitute no objection to a revision of its final judgments by writ of error.

In the case of Parsons against Armor, brought to this court by writ of error from Louisiana, and decided the present term, the court has sustained its jurisdiction. That case in no respect differs in principle from this, except that the amount due was ascertained by the court in that cause, and in this by a jury. Both causes were brought against Parsons to recover the price of certain quantities of tobacco sold to Fiske, the alleged agent of the defendant. The same testimony was used in both causes, with the exception of the bills of exchange.

In the case of Armor, the court looked into the testimony, which was certified as a part of the record. From this testimony it appeared that Fiske acted as the factor of Parsons, and in no other respect as his agent; that Parsons looked to Fiske for the faithful disbursement of the funds placed in his hands, and the purchases were made in his name, and the payments sometimes in drafts, and at others in cash; that the credit was given to Fiske and not to Parsons by the vendors of the articles purchased. The court therefore reversed the judgment obtained against Parsons in the district court.

The testimony, thus examined by the court, was not made a part of the record by a bill of exceptions, but was taken down at the trial. Had this been done in a case at common law, the court would not have considered the testimony as a part of the record; and consequently they could not have looked into it in deciding the cause. But the practice of the district court, under the sanctions of the act of 1824, was considered as presenting the testimony in that cause as fully to the consideration of this court, as in a case at common law, where it is embodied in a bill of exceptions. The facts being ascertained by the court, on weighing the testimony the law was pronounced in its judgment.

[*Parsons vs. Bedford et al.*]

The law of Louisiana requires the testimony to be taken down, if demanded by either party, as well where a jury is impanelled as where the cause is submitted to the court. But in the case under consideration, the court, at the trial, refused to order the testimony to be taken in writing, although a motion to that effect was made. This refusal is the principal ground on which the plaintiff in error relies for the reversal of this judgment. He claimed a right secured to him by law, which was refused; and he seeks redress by writ of error.

This redress cannot be given, it is urged; because, if the testimony had been taken down, it could have been of no advantage to the plaintiff in error, as this court could not examine it. And why may not this testimony be examined by the court, the same as in the case of *Armor*. The facts are the same, and no difference exists in the merits of the claims.

The reply is, that in this case a jury passed upon the claim, and in the other the court, exercising the functions of a jury, decided both the fact and the law. The difference then consists in this; that the jury found the facts in the one case, and the court in the other; and in both cases the law was pronounced by the court.

This difference in the mode of decision, it would seem, ought not to affect the judgment of this court, unless there be some positive provision of law which must control it.

The seventh article of the amendment of the constitution is referred to as conclusive on the point. It reads, "in all suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

To this objection an answer may be given, which to me is satisfactory.

This is not a suit at common law, and therefore does not come strictly within the provision of the article.

In what respect can this action be compared to a suit at common law?

[*Parsons vs. Bedford et al.*]

It was commenced by petition, and in all the stages through which it has been carried, no step has been taken in conformity to the common law; unless it be that the matter in controversy was submitted to a jury, and a bill of exceptions taken. Does this make it a common law proceeding? A jury is often called to try matters of fact in a chancery case, and in the admission of evidence, the rules of the common law are observed. But does this make the principal proceeding an action at law? Surely not. And can the same mode of trial under the statute of Louisiana have that effect? The proceedings under this statute are as dissimilar to the common law process, as are the rules of chancery. The whole proceeding under the statute is in derogation of the common law. How then can it be called a common law proceeding? If it contain one feature of the common law, that does not change the character of the suit. The mode of redress is, under the special provisions of the statute, a remedy created by the law of the state. Can this procedure be called a suit at common law.

The words in the latter clause of the seventh article, "and no fact tried by a jury shall be otherwise re-examined in any court of the United States," refer to the first clause of the sentence, which limits the trial to "suits at common law." If this were not the true construction of the sentence, facts found by a jury in an issue directed by a court of chancery, would be conclusive on the chancellor. The verdict has never been so considered, and especially in the appellate courts of chancery. If the intervention of a jury in this case do not change its character, so as to make it a common law proceeding, then there is no difference in principle between this case and that of *Armor*. As the court in that cause looked into the testimony to ascertain the facts, so as to apply the principles of law, why not do the same in this. In that case the judgment of the circuit court was reversed. A reversal in this case would render it proper to send down the cause for trial.

But the circuit court in this case refused to order the testimony to be taken down at the trial. This is undoubtedly error, if this court could examine the testimony, as it did in

[*Parsons vs. Bedford et al.*]

Armor's case. Had that case been considered by the court as a suit at common law, it must have been dismissed, or the judgment affirmed. It was under the particular practice of the district court that this court considered itself authorised to look into the testimony which formed a part of the record in that cause, and by this procedure established the fact, that it was not strictly an action at common law. This appears to me to relieve the case under consideration from difficulty. For, if the suit of Armor was not a common law proceeding, neither is this suit; and consequently it is free from any constitutional objection in this court.

The objection made, that if congress by adopting the practice of the Louisiana courts may evade the provisions of the seventh amendment, and that they may abolish the trial by jury in the courts of the United States, by creating special remedies not known to the common law; is answered by saying, that congress have the power to do much, which it is not probable they will do. Have they not power to repeal the acts which confer jurisdiction on the courts of the United States, and which regulate their practice? This would not only take away the right of trial by jury in such courts, but all trials of every description. Is it at all probable that this power will be exercised? The answer must be in the negative; and so must the answer to an inquiry whether congress, by creating new remedies, will dispense with the trial by jury.

Is this article of the constitution to be construed to mean, by the words "suits at common law," all suits which are not properly called cases of equity, of admiralty and maritime jurisdiction? Under the practice of Louisiana, how are such suits to be distinguished? The form of action is the same in equity as at law; and if in all cases where a legal right could be prosecuted in other states, at the common law, they are to be denominated actions at law in Louisiana, the design of congress in adopting the Louisiana practice is defeated. The act of 1824 intended to relieve the parties to a suit in the district court in Louisiana from the forms of the common law, or the special regulations of

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the judiciary act of 1789, because they were not adapted to the modes of proceeding in that court.

Suppose congress had specially provided, that in all trials before the district court of Louisiana, the testimony should be taken down, and that it should form a part of the record, so as to present the facts to the supreme court in the same manner as though they had been embodied in a prayer for special instructions to the jury, and brought up by bill of exceptions; might not this court determine the questions of law arising in the case? This, it appears to me, is neither more nor less than has been done by the act of 1824.

Are all the laws of the different states for the valuation of improvements by commissioners, where a recovery for land is had against a bona fide occupant who claimed title, unconstitutional? If suit be brought in the state courts, these laws are enforced as constitutional; but, if brought in the circuit court of the United States, they are unconstitutional. This would make the constitutionality of acts depend, not upon a construction of the constitution, but upon the jurisdiction where the action is brought. It would give redress in the state courts, which in the United States courts would be unconstitutional.

This would be the inevitable consequence if the provision in the seventh article be restricted in its application to the courts of the United States, and be construed to embrace every species of action where a legal right is prosecuted. And, if to escape this consequence, the provision of the article be extended to embrace all cases which come within the above construction, without reference to the jurisdiction where the remedy is sought; then all laws extending the jurisdiction of justices of the peace above twenty dollars are unconstitutional; and also every arbitration system, which does not require a jury. An appeal from the judgment of a justice of the peace will not evade the constitutional objection; for the judgment is final, and the question involves the right of the justice to give judgment in the case, without the intervention of a jury.

Suppose congress, for the purpose of adjusting land titles in a district of country, should establish a special court,

[*Parsons vs. Bedford et al.*.]

called commissioners, to examine and determine between the different claimants ; would their proceedings be valid, under the seventh amendment of the constitution ? This mode has been adopted by congress to settle claims to lands under the Louisiana treaty ; and the acts of the commissioners have been confirmed. If such a proceeding was to be denominated the prosecution of a legal right, and consequently a suit at common law, because it was not a case in equity ; the decision was void under the seventh article, and also any act of legislation confirming it.

From the foregoing considerations I am brought to the conclusion, that this case is not strictly a suit at common law ; and that this court may, under the act of 1824, as it did in the case of Armor, look into the record, and, from the facts there set forth, determine the question of law : and as the court below refused to order the testimony to be taken down ; I think the defendant has been deprived of a right secured to him by law ; and that for this error, the judgment should be reversed, and the cause sent down for further proceedings ; with instructions to the district court to order the testimony to be taken down at the trial.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of Louisiana, and was argued by counsel ; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said district court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

FARRAR AND BROWN vs. THE UNITED STATES.

The practice has uniformly been, since the seat of government was removed to Washington, for the clerk of the court to enter at the first term to which any writ of error or appeal is returnable, in cases in which the United States are parties, the appearance of the attorney general of the United States. This practice has never been objected to. The practice would not be conclusive against the attorney general, if he should at the first term withdraw his appearance, or move to strike it off. But if he lets it pass for one term, it is conclusive upon him, as to an appearance.

The decisions of this court have uniformly been, that an appearance cures any defects in the form of process.

MR BENTON moved the court for leave to reinstate this case, which had been dismissed on a former day of the term for want of an appearance of the plaintiffs in error.

At the first term, when the writ of error was filed, the clerk of the court had entered the appearance of the attorney general of the United States, according to the usual practice in such cases.

The attorney general now said, he should not object to the reinstatement if the court thought it proper under the circumstances; but he had intended to take an objection at the time when the suit was dismissed, if any person had then appeared. It was, that the citation for the writ of error was returnable to a day out of term, to wit: on the *first* Monday of January 1828, instead of the *second* Monday of that year.

Mr Chief Justice MARSHALL delivered the opinion of the court as follows:

The practice has uniformly been, ever since the seat of government was removed to Washington, for the clerk to enter, at the first term to which any writ of error or appeal is returnable, the appearance of the attorney general in every case to which the United States are a party, by entering his name on the docket. This practice must have been known to every attorney general, and has never been objected to

[Farrar and Brown *vs.* The United States.]

It might be considered, therefore, as having an implied acquiescence on the part of the attorney general; although it is admitted that there is no evidence of any express assent. We do not say that this practice would be conclusive against the attorney general, if he should at the first term withdraw such appearance, or move to strike it out, in order to take advantage of any irregularity in the service of process. But if he lets it pass for that term, without objection; we think it is conclusive upon him as to an appearance.

The decisions of this court have uniformly been that an appearance cures any defect in the service of process; and there is nothing to distinguish this case from the general doctrine. The cause therefore is ordered to be reinstated.

On consideration of the motion made by the attorney general on the part of the defendants in error in this cause, to dismiss the writ of error in this cause, on the ground that the citation is made returnable to a day during the vacation, to wit, on the *first* Monday in January, A.D. 1828, whereas the return day should have been the *second* Monday in January, A.D. 1828, it is ordered by the court, that inasmuch as the said defect is cured by the appearance of the attorney general on the part of the defendant, said motion be, and the same is hereby overruled.

**THE STATE OF NEW JERSEY, COMPLAINANTS vs. THE PEOPLE OF
THE STATE OF NEW YORK, DEFENDANTS.**

The subpoena issued on the filing of a bill in which the state of New Jersey were complainants, and the state of New York were defendants, was served upon the governor and attorney general of New York sixty days before the return day, the day of the service and return inclusive. A second subpoena issued, which was served on the governor of New York only, the attorney general being absent. There was no appearance by the state of New York.

By the Court: This is not like the case of several defendants, where a service on one might be good, though not on another. Here the service prescribed by the rule is to be on the governor, and on the attorney general. A service on one is not sufficient to entitle the court to proceed.

Upon an application by the counsel for the state of New Jersey, that a day might be assigned to argue the question of the jurisdiction of this court to proceed in the case, the court said they had no difficulty in assigning a day. It might be as well to give notice to the state of New York, as they might employ counsel in the interim. If, indeed, the argument should be merely *ex parte*, the court could not feel bound by its decision; if the state of New York desired to have the question again argued.

A notice was given by the solicitors for the state of New Jersey to the governor of the state of New York, dated the 12th of January 1830, stating that a bill had been filed on the equity side of the supreme court, by the state of New Jersey, against the people of the state of New York, and that on the 18th of February following, the court would be moved in the case for such order as the court might deem proper, &c. Afterwards, on the day appointed, no counsel having appeared for the state of New York, on the motion of the counsel for the state of New Jersey, for a subpoena to be served on the governor and attorney general of the state of New York; the court said: as no counsel appears to argue the motion on the part of the state of New York, and the precedent for granting it has been established, upon very grave and solemn argument, the court do not require an *ex parte* argument in favor of their authority to grant the subpoena, but will follow the precedent heretofore established. The state of New York will be at liberty to contest the proceeding at a future time in the course of the cause, if they shall choose so to do.

A BILL was filed on the equity side of the court, by the state of New Jersey, on the 20th of February 1829, against the people of the state of New York; and on motion of Mr Wirt for the complainants, a subpoena was awarded by the court on the 16th of March 1829. The writ issued on the 26th of May 1829. A copy of the subpoena and of the bill

[*Parsons vs. Bedford et al.*]

government to the moral and social condition of the governed. This is no less true in a judicial than it is in a political point of view ; and where an intelligent people possess the sovereign power, they will not fail to secure this first object of a good government.

By an act of congress of the 26th of May 1824, it is provided that the mode of proceeding in civil causes in the courts of the United States, that now are, or hereafter may be established in the state of Louisiana, shall be conformable to the laws directing the mode of practice in the district courts of the said state : provided, that the judge of any such court of the United States may alter the times limited or allowed for different proceedings in the state courts, and make, by rule, such other provisions as may be necessary to adapt the said laws of procedure to the organization of such court of the United States, and to avoid any discrepancy, if any such exist, between such state laws and the laws of the United States.

There is no evidence before the court that the power given to the district judge in this proviso has been exercised : the first part of the section, which adopts in the district court of the United States the same mode of proceeding in civil actions as is established in the courts of the state, must therefore be considered as in force. And until this power be exercised, this section is a virtual repeal of so much of the judiciary act of 1789, and all other acts prior to 1824, which came within its provisions. It is contended, that whatever may be the rules of practice in the district court of Louisiana, they do not confer jurisdiction on this court. The force of this objection is admitted.

Any law regulating the practice of an inferior court does not confer jurisdiction on an appellate court ; but where such court has jurisdiction of the case, it must be governed in its decision by the rules of practice in the court below.

This court has jurisdiction by writ of error to revise the final judgment, in any civil action, of a circuit court of the United States where the matter in controversy exceeds two thousand dollars. Whether this judgment be obtained by the forms of the civil or the common law is immaterial.

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The only essential requisites to give jurisdiction are, that it be a civil action, involving a matter in controversy exceeding two thousand dollars; and that the judgment be final.

The forms of proceeding adopted under the Louisiana practice, in the district court, constitute no objection to a revision of its final judgments by writ of error.

In the case of Parsons against Armor, brought to this court by writ of error from Louisiana, and decided the present term, the court has sustained its jurisdiction. That case in no respect differs in principle from this, except that the amount due was ascertained by the court in that cause, and in this by a jury. Both causes were brought against Parsons to recover the price of certain quantities of tobacco sold to Fiske, the alleged agent of the defendant. The same testimony was used in both causes, with the exception of the bills of exchange.

In the case of Armor, the court looked into the testimony, which was certified as a part of the record. From this testimony it appeared that Fiske acted as the factor of Parsons, and in no other respect as his agent; that Parsons looked to Fiske for the faithful disbursement of the funds placed in his hands, and the purchases were made in his name, and the payments sometimes in drafts, and at others in cash; that the credit was given to Fiske and not to Parsons by the vendors of the articles purchased. The court therefore reversed the judgment obtained against Parsons in the district court.

The testimony, thus examined by the court, was not made a part of the record by a bill of exceptions, but was taken down at the trial. Had this been done in a case at common law, the court would not have considered the testimony as a part of the record; and consequently they could not have looked into it in deciding the cause. But the practice of the district court, under the sanctions of the act of 1824, was considered as presenting the testimony in that cause as fully to the consideration of this court, as in a case at common law, where it is embodied in a bill of exceptions. The facts being ascertained by the court, on weighing the testimony the law was pronounced in its judgment.

[*State of New Jersey vs. The State of New York.*]

The first subpoena was served upon the governor and attorney general sixty days before the return day, the day of the service and of the return inclusive. Whether this was sufficient, according to the course of the court, he was desirous to know. The second subpoena was served on the governor only; the attorney general being absent. Was it necessary, to make the service good, that it should be served upon both? Mr Wirt referred to the rules of the court on this subject, particularly the rule adopted in August term 1796.

Mr Chief Justice MARSHALL said, that this was not like the case of several defendants, where a service on one might be good, though not on another. Here the service prescribed by the rule was to be upon the governor and upon the attorney general. A service on one was not sufficient to entitle the court to proceed against the state.

Mr Wirt then said, that he should be glad to have a day assigned to argue the point of jurisdiction, if the court chose, before another subpoena issued; as it might, if decided against the plaintiffs, prevent unnecessary expenses. He would be willing that it should be at so distant a day, as to enable the state of New York to appear and employ counsel. He mentioned three weeks from the day of the application.

Mr Chief Justice Marshall said, the court had no difficulty in assigning that day for the motion. It might be as well to give notice to the state of New York, as they might employ counsel in the interim. If, indeed, the argument should be merely ex parte, the court would not feel bound by its decision; if the state of New York afterward desired to have the question again argued(a).

Motion granted, and notice directed.

(a) The following letters, addressed by the attorney general of New York to the clerk of the court, dated July 27, 1829, and to the chief justice and the associate justices, dated January 8, 1830, were read during the discussion.

[*State of New Jersey vs. The State of New York.*]

In conformity with the direction of the court, notice of the day appointed for hearing the motion for a subpoena was

Utica, N. Y. July 27, 1829.

William Thomas Carroll, Esquire, Clerk of the Supreme Court of the United States.

Sir,

The governor and attorney general of the state of New York were recently served with the copy of a bill in equity, said to have been exhibited in the supreme court of the United States, by "The State of New Jersey vs. The People of the State of New York," and with a subpoena in that cause to appear on the first Monday of August next.

I beg leave respectfully to say, that such service is regarded on the part of the state of New York as utterly void, because the mode adopted is unknown to the common law, is not authorised by any statute of the United States, nor warranted by any existing rule or order of the court out of which the process issued. A rule on the subject of the service of process was adopted in August term 1796, 3 Dall. Rep. 320, 335; but this rule, so far as I have observed, has been omitted in every subsequent publication of the rules of the supreme court; and is no doubt obsolete.

Entertaining this view of the subject, it is supposed that no proceeding will be had in the cause, either in vacation or at term, until the court shall have directed the mode of serving such process, and the prescribed course shall have been pursued.

Whether the court has been clothed with power to compel the appearance of a state as defendant in an original suit or proceeding, is a question, among others, which will no doubt receive from that high tribunal all the consideration that its importance demands, before any order shall be made in the premises.

I will thank you to hand this to the court, if the subject shall ever be presented to their consideration, and should any rule or order be made in, or affecting this cause, please send a certified copy, addressed to me at Albany.

I am, Sir, with great respect,

Your obedient servant,

GREEN C. BRONSON,

Attorney General of New York.

Washington City, January 8, 1830.

To the Honourable the Chief Justice, and his Associate Justices of the Supreme Court of the United States.

A bill has been exhibited in this court by the state of New Jersey, against the people of the state of New York, concerning the boundary line between the two states, and a subpoena to appear and answer, with a copy of the bill, has been served upon the governor of the state of New York. A notice has recently been served, that on the 18th instant the court would be moved to take the bill *pro confesso*, and proceed to a decree for the want of an appearance.

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[State of New Jersey *vs.* The State of New York.]

forthwith served on the governor, and on the attorney general of the state of New York; and on the day assigned by the court, the 6th of March 1830, Mr Southard, attorney general of the state of New Jersey, and Mr Wirt, attended as counsel for the complainants. No counsel appeared for the state of New York.

The counsel for the state of New Jersey inquired of the court if they would hear an argument on the motion that a subpoena might issue to be served on the governor and attorney general of the state of New York, stating that they were willing and prepared to go into the same.

Mr Chief Justice MARSHALL said, as no one appears to argue the motion on the part of the state of New York, and the precedent for granting the process has been established upon very grave and solemn argument, in the case of *Chisholm vs. The State of Georgia*, 2 Dall. Rep. 419, and *Grayson vs. The State of Virginia*, 8 Dall. 320, the court do not think it proper to require an *ex parte* argument in favour of their authority to grant the subpoena, but will follow the precedent heretofore established.

The court are the more disposed to adopt this course, as the state of New York will still be at liberty to contest the

I beg leave respectfully to say, that the opinion is entertained on the part of the state of New York, that this court cannot exercise jurisdiction in such a case, without the authority of an act of congress for carrying into execution that part of the judicial power of the United States which extends to controversies between two or more states.

The governor of the state of New York has made a communication upon the subject of this suit to the legislature now in session; but it has not yet been acted upon, so far as I have been advised. Whether the legislature will authorise any person to appear and discuss the question of jurisdiction; or whether, for the purpose of obtaining a judicial decision upon the merits of an unfortunate controversy, they will order an appearance, waiving the question of jurisdiction, I am, at this time, unable to determine.

I have deemed it proper to make this communication, to explain what might otherwise be supposed a want of respect for this honourable court, on the part of the executive of New York.

GREEN C. BRONSON,
Attorney General of New York.

[State of New Jersey vs. The State of New York.]

proceeding at a future time in the course of the cause, if it shall choose to insist upon the objection.

On consideration of the motion made by Messrs Southard and Wirt, solicitors for the complainant in this cause, on Saturday the 13th day of February of the present term of this court, praying the court to postpone the consideration of this cause until Saturday the 6th of March of the present term of this court, with leave to the counsel for the said complainant on that day either to argue the point of jurisdiction, or to move the court for a decree in pursuance of the notice therein recited, or for new process in case the court should determine that the service of the process in this case was not sufficient to entitle the court to proceed against the state of New York, or for such other order as to the court may seem meet: it is considered by the court, that as no one appears to argue this motion on the part of the state of New York, and the precedent has been established in the case of Chisholm's Executors against the State of Georgia, the court do not consider it proper to require an ex parte argument, but will follow the precedent so established after grave and solemn argument. The court is the more disposed to adopt this course, as the state of New York will be at liberty to contest this proceeding at any time in the course of the cause. Whereupon it is ordered by the court that, as the service of the former process in this cause was defective, inasmuch as it was not served sixty days before the return day thereof, as required by the rules of this court, process of subpoena be, and the same is hereby awarded as prayed for by the complainant(a).

(a) The following is a copy of the subpoena awarded by the court:

The president of the United States to the governor and the attorney general of the state of New York, greeting:—For certain causes offered before the supreme court of the United States, holding jurisdiction in equity, you are hereby commanded and strictly enjoined, that, laying all matters aside, and notwithstanding any excuse, you personally be and appear, on behalf of the people of the said state of New York, before the said supreme court, holding jurisdiction in equity, on the first Monday in August next, at the city of Washington, in the

SUPREME COURT.

[State of New Jersey vs. The State of New York.]

district of Columbia, being the present seat of the national government of the United States, to answer concerning the things which shall then and there be objected to the said state, and to do further and receive on behalf of the said state, what the said supreme court, holding jurisdiction in equity, shall have considered in this behalf; and this you may in no wise omit, under the penalty of five hundred dollars. Witness, the honourable John Marshall, Esquire, chief justice of the said supreme court at Washington city, the second Monday in January, being the 11th day of said month, in the year of our Lord 1839; and of the independence of the United States the fifty-fourth.

WILLIAM THOMAS CARROLL,
Clerk of the Supreme Court of the United States.

JOHN SMITH T. vs. JOHN W. HONEY.

Where the verdict for the plaintiff in the circuit court is for a less amount than two thousand dollars, and the defendant prosecutes a writ of error, this court has not jurisdiction; although the demand of the plaintiff in the suit exceeded two thousand dollars.

ERROR from the district court of Missouri.

In the district court of Missouri, John W. Honey instituted an action of trespass on the case for the recovery of damages from John Smith T., the defendant in the action, for the use of a "new and useful improvement in screening tables for discriminating, selecting and separating perfect from imperfect shot," for which letters patent had been granted to the plaintiff by the United States. The damages were laid in the declaration at two thousand dollars; and at September term 1827 the cause was tried, and a verdict rendered for the plaintiff, for one hundred dollars, upon which judgment was entered for the plaintiff below.

On the trial, the counsel for the defendant filed several bills of exceptions to the opinion of the court, and prosecuted this writ of error.

After the case was opened for the plaintiff in error, the court ordered the writ of error to be dismissed, the same having been sued out by the defendant in the district court, and the sum in controversy, as to him, being no more than one hundred dollars, the amount of the verdict in that court. See the case of *Gordon vs. Ogden*, at this term; *ante p. 33.*

Benton and Hempstead for the plaintiff in error; Lawless for the defendant.

Afterwards Mr. M'Ginness, for the plaintiff in error, on affidavit, stating that the plaintiff in the district court estimated the damages which had accrued to him by the use of his machine by the defendant at two thousand dollars, and had sought to recover the same in the action, moved to reinstate the cause.

The court overruled the motion.

JOHN G. M'DONALD, PLAINTIFF IN ERROR vs. GEORGE B. MAGRUDER, DEFENDANT.

A note was discounted at the office of discount and deposit of the bank of the United States in the city of Washington, for the accommodation of the drawer, indorsed by Magruder and by M'Donald; neither of the indorsers receiving any value for his indorsement, but indorsing the note at the request of the drawer, without any communication with each other. The note was renewed from time to time, under the same circumstances, and was at length protested for non-payment: and separate suits having been brought by the bank against the indorsers, the drawer being insolvent, judgments in favour of the bank were obtained against both the indorsers. The bank issued an execution against Magruder, the first indorser, and he having paid the whole debt and costs, instituted this suit against M'Donald, the second indorser, for a contribution, claiming one half of the sum so paid by him in satisfaction of the judgment obtained by the bank. Held, that he was not entitled to recover.

That a prior indorser is, in the regular course of business, liable to his indorsee, although that indorsee may have afterwards indorsed the note, is unquestionable. When he takes up the note he becomes the holder as entirely as if he had never parted with it, and may sue the indorser for the amount. The first indorser undertakes that the maker shall pay the note, or that he, if due diligence be used, will pay it for him. This undertaking makes him responsible to every holder, and to every person whose name is on the note subsequent to his own, and who has been compelled to pay its amount. [474]

The indorser of a promissory note, who receives no value for his indorsement from a subsequent indorser, or from the drawer, cannot set up the want of consideration received by himself; he is not permitted to say that the promise is made without consideration; because money paid by the promisee to another, is as valid a consideration as if paid to the promisor himself. [476]

Co-sureties are bound to contribute equally to the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive. [477]

ERROR to the circuit court of the county of Washington, in the district of Columbia.

This was an action of assumpsit, instituted in the circuit court by the defendant in error against the plaintiff in this court. The matters in controversy were submitted to the jury by a case agreed, which stated, that the plaintiff produced in evidence a promissory note drawn by Samuel Turner, Jun. in favour of George B. Magruder, or order, at sixty days, for \$900, payable at the office of discount and deposit at Washington, for value received; which note was signed by

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Samuel Turner, and indorsed by George B. Magruder, and by John G. M'Donald.

The note was so drawn and indorsed, with the understanding of all the parties thereto, that it should be discounted in the office of discount and deposit, for the sole use and accommodation of the maker, Samuel Turner; no value being received by either of the indorsers. It was so discounted, and the proceeds thereof applied to the credit of Turner, in the office. Long before the making of the note, viz. in the year 1819, Turner had two notes discounted for his use and accommodation in the office, viz. one for \$270, indorsed by George B. Magruder and by G. M'Donald, and one for \$710, indorsed by George B. Magruder and one Samuel Hambleton; which last mentioned note was continued, by renewal, with the indorsement of Magruder and Hambleton, until September 1820, when, in consequence of Hambleton's absence, it was protested; after which the office permitted the accommodation to be renewed, upon condition that Turner would get another good indorser in the place of Hambleton. Whereupon John G. M'Donald, upon the solicitation of Turner, indorsed a note for the sum of \$710, which was brought to him, already indorsed by George B. Magruder. That in March 1821, a small part of the money having been paid, the two notes were consolidated and renewed by one note for \$950, drawn by Turner, and indorsed by Magruder and by M'Donald, which was from time to time renewed by notes similarly drawn and indorsed; the last of which is this note, so produced in evidence by the plaintiff. Neither at the time of indorsing the notes respectively, nor at any other time, was there any communication between Magruder and M'Donald upon the subject of such indorsement. Both of them however knew at the time of indorsement the notes were intended to be discounted for the accommodation of Turner; and in every instance Magruder was the first indorser. The note, so produced in evidence by the plaintiff, not having been paid when due, was duly protested; and the payment thereof having been duly demanded, and due notice given of such demand, and of non-payment having been

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given to the indorsers, judgments at law were recovered against both, by the Bank of the United States; and the whole amount having been paid by Magruder, he brought this suit to recover from M'Donald one half of the amount so paid by him.

By consent of the parties, a verdict was rendered for the plaintiff, for one half of the amount so paid by the said Magruder, in satisfaction of the judgment against him; subject to the opinion of the court upon the case agreed.

Upon the case stated, the court below gave judgment for the plaintiff; and the defendant sued out this writ of error.

Mr Jones, for the plaintiff in error, contended,

1. That by the showing of the plaintiff himself, in the case stated, there never was any contract between the parties, but what their several indorsements on the note import.

2. That the import and effect of the contract of indorsement, the only contract between the parties, and that not attempted to be explained or modified by any collateral agreement or understanding whatever, were that the plaintiff himself, as first indorser and payee of the note, should pay and satisfy the whole amount of the note, in default of the maker, and should completely indemnify and save harmless the defendant, as last indorser, against all recourse from the holder. Consequently, if the bank had chosen to enforce the separate judgment which they had recovered against the last, instead of the first indorser, the former would have been entitled to recover of the latter, not a moiety, but the whole of the amount.

3. That this, the legal effect of the only contract subsisting between the parties, so far from being changed or impaired, is confirmed and strengthened by the origin and circumstances of the debt, as explained in the case stated; from which it appears, that near three-fourths of the amount consisted of a prior debt due from the plaintiff to the bank, for which M'Donald never was liable, till he made himself so, as indorsee of the plaintiff below, and as second indorser.

This action was brought by the first indorser against the second indorser of a promissory note, for contribution, he

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having paid the note to the holder. There never was any contract between the parties but that which appears on the face of the note. In the true sense of this agreement, Magruder promises to pay the note in case of the failure of the drawer to do so, and to save the subsequent indorser, the plaintiff in error, harmless. There is nothing collateral to this agreement; were it necessary or proper to go into any inquiry as to the real circumstances of the parties, three-fourths of the sum received on the discount of the note were for Magruder's use.

The only circumstance upon which the claim of the defendant in error can be supposed to rest, is, that the note was to go into bank for the benefit of the drawer; and this will not raise a contract, either express or by implication, different from that which is the known and established construction of such instruments. This is well known; and all who become parties to such contracts, are bound by the well established principles of law, operating upon them under such relations.

Mr Key, for the defendant, said, the question presented in this case is not novel. It has been frequently discussed in courts, and the position assumed for the defendant in error is founded in equity. It is claimed to divide the loss sustained by the failure of the drawer of the note between the indorsers. The bank had judgment against the indorsers. Magruder paid the whole amount of the execution against him, and proceedings on the execution against M'Donald were stayed, until this suit shall determine the rights of the parties.

In this case the note was made for the sole purpose of discount for the drawer, and the indorsers put their names upon it for that purpose only. As between the bank, there is no doubt the obligation of each was for the whole amount of the note; but between themselves it was not so. They united for the drawer, and they made no contract with each other for indemnity. The only contract was, that each should become one of two indorsers, for the benefit of the drawer, and that they would become mutual and equal sureties.

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In other commercial contracts, the circumstances under which they arise are gone into. A bill of exchange drawn without funds in the hands of the drawer, is not subject to the strict rules of notice. So also where a note has been discounted for the use of the indorser. The bank of Columbia *vs.* French, 4 Cranch, 141. These cases show, that in actions on negotiable paper you may go beyond the form of the contract.

In the present case, the note was drawn, and after it was indorsed by Magruder, was handed back to Turner; it was then, at the request of Turner, indorsed by M'Donald, and was delivered to the bank by the drawer. Between the indorsers there was no contract, no consideration passed from the first to the second, and they stood as sureties between each other. Cited, 13 Johns. 52. 3 Harris & Johns. 125.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

This is a writ of error to a judgment rendered by the circuit court of the United States, for the county of Washington, in the district of Columbia, in an action of indebitatus assumpcit, brought by the first indorser of a promissory note against the second indorser, to recover half its amount. The note was made by Samuel Turner, Jun. and indorsed George B. Magruder, John G. M'Donald. At the trial of the cause a case was agreed by the parties, and the judgment of the circuit court was rendered in favour of the plaintiff on a verdict given by the jury, subject to the opinion of the court.

That a prior indorser is, in the regular course of business, liable to his indorsee, although that indorsee may have afterwards indorsed the same note, is unquestionable. When he takes up the note he becomes the holder as entirely as if he had never parted with it, and may sue the indorser for the amount. The first indorser undertakes that the maker shall pay the note; or that he, if due diligence be used, will pay it for him. This undertaking makes him responsible to every holder, and to every person whose name is on the note subsequent to his own, and who has been compelled to pay its amount.

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This is the regular course of business where notes are indorsed for value: but it is contended that where less than the amount is received, the indorser is responsible to his immediate indorsee only for the sum actually paid; consequently, if nothing is paid, the mere indorsement does not bind the indorser to pay his immediate indorsee any thing. If B. indorses to C. the note of A. without value, and A. fails to take it up, it is as between B. and C. a contract without consideration, on which no action arises. This is undoubtedly true if C. retains the note in his own possession; and may be equally true if he indorses it for value. When he repays the money he has received, he is replaced in the situation in which he would have been had he never parted with the note. If he puts it into circulation on his own account, new relations may be created between himself and his immediate indorsee, which may be affected by circumstances. In the case under consideration, the note took the direction intended by all the parties. It was indorsed by Magruder for the purpose of enabling Turner to discount it at the bank. To insure this object, Turner applied to M'Donald, who placed his name also on the paper. No intercourse took place between the indorsers. No contract express or implied existed between them other than is created by their respective liabilities, produced by the act of indorsement. What are these liabilities? The first indorser gave his name to the maker of the note for the purpose of using it in order to raise the money mentioned on its face. He made himself responsible for the whole sum upon the sole credit of the maker. His undertaking is undivided. He does not understand that any person is to share this responsibility with him.

But either the bank is unwilling to discount the note on the credit of the maker and his single indorser, or the maker supposes his object will be insured by the additional credit given by another name. He presents the note therefore to M'Donald, and asks his name also. M'Donald accedes to his request, and puts his name on the instrument. If the maker passes the note for value, the liability of M'Donald to the holder is the same as if that value had been received

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by M'Donald himself. Why is this? No consideration is received by M'Donald, and this fact is known to the holder and discountner of the note. But a consideration is paid by the holder to the maker, and paid on the credit of M'Donald's name. He cannot set up the want of a consideration received by himself; he is not permitted to say that the promise is made without consideration; because money paid by the promissee to another, is as valid a consideration as if paid to the promissor himself.

In what does the claim of the second on the first indorser differ from that of the holder on the second indorser? Neither has paid value to his immediate indorser; but the holder has paid value to the maker on the credit of all the names to the instrument. The second indorser, if he takes up the note, has paid value to the holder in virtue of the liability created by his indorsement. If this liability was founded equally on the credit of the maker and of the first indorser, if his undertaking on the credit of both subjects him to the loss consequent on the payment of the note; how can the contract between him and his immediate indorser be said to be without consideration?

If it be true, as we think it is, that Magruder, when he indorsed the note, and returned it to the maker to be discounted, made himself responsible for its amount on the failure of the maker, if this responsibility was then complete, how can it be diminished by the circumstance that M'Donald became a subsequent indorser? How can the legal liability of a first indorser to the second, who has been compelled to take up the note, be changed otherwise than by an express or implied contract between the parties?

This question has arisen and been decided in the courts of several states. *Wood vs. Repold*, 3 Harris & Johns. 125, was a bill drawn by A. Brown, Jun. at Baltimore, on Messrs Goold and Son of New York, in favour of G. Wood & Co., and indorsed by G. Wood & Co. and afterwards by Repold, the plaintiff. The bill was drawn and indorsed for the purpose of raising money for the drawer, and was discounted at the bank of Baltimore. On being protested for non-payment, it was taken up by Repold, and this suit brought against the

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first indorser. Payment was resisted because the indorsement was, without consideration, for the accommodation of the drawer; but the court sustained the action. The same question arose in *Brown vs. Mott*, 7 Johns. 361, on a promissory note, and was decided in the same manner. In that case the court said, that if he had taken it up at a reduced price, it would seem that he could only recover the amount paid. Undoubtedly, if M'Donald had been compelled to pay a moiety of this note, he could have recovered only that moiety from Magruder.

The case of *Douglass vs. Waddle*, 1 Hammond, 413, was determined differently. This case was undoubtedly decided on general principles; but the custom of the country and a statute of the state are referred to by the court as entitled to considerable influence. The weight of authority as well as of usage is, we think in favour of the liability of the first indorser.

The claim of Magruder has also been maintained on the principle that they are co-sureties, and that he who has paid the whole note may demand contribution from the other.

The principle is unquestionably sound if the case can be brought within it. Co-sureties are bound to contribute equally to the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive. Magruder and M'Donald might have become joint indorsers. Their promise might have been a joint promise. In that event each would have been liable to the other for a moiety. But their promise is not joint. They have indorsed separately and successively, in the usual mode. No contract, no communication, has taken place between them which might vary the legal liabilities these indorsements are known to create. Those legal liabilities therefore remain in full force.

Upon this question of contribution, the counsel for the defendants in error rely on two cases, reported in 2 Bos. & Pull. 268 and 270. The first, *Cowell vs. Edwards*, was a suit by one surety on a bond against his co-surety for contribu-

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tion. It was intimated by the court that each surety was liable for his aliquot part, but not liable at law to any contribution on account of the insolvency of some of the sureties. The party who had paid more than his just proportion of the debt could obtain relief in equity only.

The second case, Sir Edward Deering *vs.* The Earl of Winchelsea, Sir John Rous, and the Attorney General, was a suit in chancery, in the exchequer. Thomas Deering had been appointed receiver of fines, &c. and had given three bonds conditioned for faithful accounting, &c. In one of these the plaintiff was surety, in another lord Winchelsea, and in the third, sir John Rous. Judgment was obtained on the bond in which the plaintiff was surety, and this suit was brought against the sureties to the two other bonds for contribution. It was resisted on the ground that there was no contract between the parties, they having entered into special obligations. The lord chief baron was disposed to consider the right to contribution as founded rather on the equity of the parties than on contract, and the court decreed contribution.

In this case the parties were equally bound, were equally sureties for the same purpose, and were equally liable for the same debt. Neither had any claim upon the other superior to what that other had on him. The parties stood in the same relation, not only to the crown, to whom they were all responsible, and to the person for whom they were sureties, but to each other. Under these circumstances contribution may well be decreed *ex equali jure*. But, in the case at bar, the parties do not stand in the same relation to each other. The second indorser gives his name on the faith of the first indorser as well as of the maker. The first indorser gives his name on the faith of the maker only. Unquestionably these liabilities may be changed by contract; but no contract existing between these parties, it is not a case to which the principle of contribution applies.

No notice has been taken of the form of the action. It is admitted that Magruder, having paid the whole note,

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may recover a moiety from M'Donald, if their undertaking is to be considered as joint; if he, as first indorser, is not responsible to M'Donald for any part of it which M'Donald may have paid.

The judgment is to be reversed, and the cause remanded, with directions to set aside the verdict, and enter judgment as on a nonsuit.

APPENDIX.

The following opinion was prepared by Mr Justice Story at February term 1819, and was not delivered; Mr Chief Justice Marshall having delivered the opinion of the court in the case. By his permission it is inserted here, as the principles discussed in the opinion are the same with some of those involved in the case of *Inglis vs. The Trustees of the Sailor's Snug Harbour*, ante, p. 99.

THE TRUSTEES OF THE PHILADELPHIA BAPTIST ASSOCIATION vs. SMITH AND ROBERTSON, 4 Wheat. 1.

STORY J. Charitable donations were of great consideration in the civil law, and bequests to pious uses were deemed privileged testaments(a). There can be little doubt that the authority of the Roman code, combining with the religious notions of former times, contributed in no small degree to engraft the principles of that law respecting charities into the common law. This was manifestly the opinion of lord Thurlow(b); and lord Eldon, in assenting to it has added, that, as at an early period the ordinary had authority to apply a portion of every man's estate to charity, when afterwards the statute compelled a distribution, it is not impossible that the same favour should have been extended to charity in the construction of wills, by their own force purporting to authorise such a distribution(c). Be this as

(a) *Swinburne*, pl. 1, s. 16, p. 103. *Id.* pl. 7, s. 8, pl. 908. 2*Domat.* 160, 161, 168.

(b) *White vs. White*, 1 Bro. Ch. Cas. 12.

(c) *Moggridge vs. Thackwell*, 7 Ves. 36, 69. *Mills vs. Farmer*, 1*Merivale*. 55, 94.

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it may, it cannot be denied that many of the privileges given to charitable testaments by the civil law have been for ages incorporated into the common law. For instance, one privilege was that no such testament was void for uncertainty either as to persons or objects. Hence, if a testator gave his goods to be distributed among the poor, or made the poor his executors, the legacy was not void; although it would have been otherwise, if charity had not been the legatee(*a*). And the same rule has been adopted into the common law, at least ever since the statute of charitable uses(*b*). Indeed, at one period, the constructions in respect to charitable bequests were pushed to a most extravagant length; and the good sense of succeeding times has lamented, and as far as it consistently could, has endeavoured to abridge the ancient doctrine to something like a rational system(*c*). It is now too late to contend that a disposition in favour of charity can be construed according to the rules which are applicable to individuals. In the first place, the same words in a will, when applied to individuals, may require a very different construction, if applied to the case of a charity. If a testator give his property to such person as he shall hereafter name to be his executor, and afterwards appoint no executor; or if, having appointed an executor, he dies in his life time, and no other is appointed in his place, in either of these cases, as to individuals, the testator must be held intestate, and his next of kin will take the estate. But to give effect to a bequest in favour of charity, chancery will in both instances supply the place of an executor, and carry into effect that which in the case of individuals must have failed altogether(*d*). Again, in the case

(*a*) Swinburne, pl. 1, s. 16, p. 104, 59. 2 Domat. lib. 4, tit. 2, s. 6, p. 161, 162, 163.

(*b*) 43 Eliz. ch. 4.

(*c*) See what is said on this subject in *Moggridge vs. Thackwell*, 1 Ves. Jun. 464. S. C. 7 Ves. 36. *Mills vs. Farmer*, 1 Merivale, 55. *Corbyn vs. French*, 4 Ves. 418. *Attorney General vs. Minshull*, 4 Ves. Jun. 11. *Attorney-General vs. Boultree*, 2 Ves. Jun. 380. *Attorney General vs. Whitchurch*, 3 Ves. Jun. 141. *Carey vs. Abbot*, 7 Ves. 490. *Attorney General vs. Baynes*, Prec. Ch. 270.

(*d*) *Mills vs. Farmer*, 1 Merivale, 55, 94. *Moggridge vs. Thackwell*, 7 Ves. 36. *Attorney General vs. Jackson*, 11 Ves. Jun. 365, 367.

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of an individual, if an estate is devised to such person as the executor shall name, and no executor is appointed, or one being appointed dies in the testator's life time, and no one is appointed in his place, the bequest amounts to nothing. Yet such a bequest to charity would be good, and the court of chancery would in such case assume the office of executor(a). So if a legacy be given to trustees to distribute in charity, and they die in the testator's life time, although the legacy is lapsed at law, (and if they had taken to their own use it would have been gone for ever), yet in equity it will be enforced(b). Again, although in carrying into execution a bequest to an individual, the mode in which the legacy is to take effect must be of the substance of the legacy, yet where charity is the legatee, the court will consider it as the whole substance of the bequest; and in such cases only, if the mode fail, will provide a mode by which that legatee shall take, but by which no other than charitable legatees can take(c). A still stronger case is, that if the testator has expressed an absolute intention to give a legacy to charitable purposes, but has left uncertain, or to some future act, the mode by which it is to be carried into effect, there the court of chancery, if no mode is pointed out, will of itself supply the defect and enforce the charity(d). Therefore it has been held, that if a man devises a sum of money to such charitable uses as he shall direct by a codicil to be annexed to his will, or by a note in writing, and afterwards leaves no direction by note or codicil, the court of chancery hath power to dispose of it to such charitable uses as it shall think fit(e). So if a testator bequeath a sum for such a

(a) Mills *vs.* Farmer, 1 Merivale, 55, 96. Moggridge *vs.* Thackwell, 7 Ves. 36.

(b) Attorney General *vs.* Hickman, 2 Eq. Cas. Abrigd. 193. Moggridge *vs.* Thackwell, 3 Bro. Ch. 517. S. C. 1 Ves. Jun. 464. 7 Ves. 36. Mills *vs.* Farmer, 1 Merivale, 55, 100. White *vs.* White, 1 Bro. Ch. 12.

(c) Mills *vs.* Farmer, 1 Merivale, 55, 100. Moggridge *vs.* Thackwell, 7 Ves. 36. Attorney General *vs.* Berryman, 1 Dick. R. 168. 2 Roper on Legacies, 130.

(d) Mills *vs.* Farmer, 1 Merivale, 55, 96. Moggridge *vs.* Thackwell, 7 Ves. 36. White *vs.* White, 1 Bro. Ch. 12.

(e) Attorney General *vs.* Syderfin, 1 Vern. 224. S. C. 2 Freeman, 261, recognized as law in Mills *vs.* Farmer, 1 Merivale, 55, and Moggridge *vs.* Thackwell, 7 Ves. 36, 70, &c.

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school as he should appoint, and he appoints none, the court may apply it for what school it pleases(*a*). The doctrine has gone yet farther, and established that if the bequest denote a charitable intention, but the object to which it is to be applied is against the policy of the law, the court will lay hold of the charitable intention, and execute it for the purpose of some charity agreeable to the law, in the room of that contrary to it. (*b*) Thus a sum of money bequeathed to found a Jew's synagogue, has been taken by the court, according to this principle, and transferred to the benefit of a foundling hospital(*c*). And a bequest for the education of poor children in the Roman catholic faith, has been decreed to be disposed of according to the pleasure of the king, under his sign manual(*d*). Another principle equally well established is, that if the bequest be for charity, it matters not how uncertain the objects or persons may be; or whether the bequest can be carried into exact execution or not; or whether the persons who are to take be in esse or not; or whether the legatee be a corporation capable in law to take or not; in all these and the like cases the court will sustain the legacy, and give it effect according to its own principles, and where a literal execution becomes inexpedient or impracticable, will execute it *cy pres*. Attorney General *vs.* Oglander, 3 Bro. Ch. 166. Attorney General *vs.* Green, 3 Bro. Ch. 492. Freer *vs.* Peacock, Rep. temp. Finch, 245. Attorney General *vs.* Barltree, 2 Ves. Jun. 380. Duke, 108 to 113. Thus a devise of lands to the church wardens of a parish (who are not a corporation capable of taking lands) for a charitable purpose, though void at law, will be sustained in equity(*e*). So if the corporation for whose use it is designed is not in esse, and cannot come into existence,

(*a*) 2 Freeman, 261. Moggridge *vs.* Thackwell, 7 Ves. 36, 73, 74.

(*b*) Da Costa *vs.* De Pas, 1 Vern. R. 248. Moggridge *vs.* Thackwell, 7 Ves. 36, 75. Carey *vs.* Abbot, 7 Ves. 490. Attorney General *vs.* Guire, 2 Vern. 236.

(*c*) Id. and Mills *vs.* Farmer, 1 Merivale, 55, 100.

(*d*) Carey *vs.* Abbot, 7 Ves. 490.

(*e*) 1 Burn's Eccles. Law. 226. Duke, 33, 115. Com. Dig. Chancery, 2, N. 2. Rivett's Case, Moore, 890. Mills *vs.* Farmer, 1 Meriv. 55. Attorney General *vs.* Bowyer, 3 Ves. 714. Wort *vs.* Knight, 1 Ch. Cas. 185. Moggridge *vs.* Thackwell, 7 Ves. 36.

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but by some future act of the crown, as for instance, a gift to found a new college, which requires an incorporation, the gift is valid, and the court will execute it(*a*). So if a devise be to an existing corporation by a misnomer, which makes it void at law(*b*). So where a devise was to the poor generally, the court decreed it to be executed in favour of three public hospitals in London(*c*). So a legacy towards establishing a bishop in America was held good, though none was yet appointed(*d*). And where a charity is so given that there can be no objects, the court will order a different scheme of the charity; but it is otherwise if objects may, though they do not at present exist(*e*); and when objects cease to exist, the court will new model the charity(*f*). And in aid of these principles the court will, in all cases of charities, supply all defects in the conveyances, where the donor hath a capacity and a disposable estate, and his mode of donation does not contravene the provisions of any statute(*g*).

Some of these doctrines may seem strange to us, as they have also seemed to lord Eldon; but he considered the cases too stubborn to be shaken without doing that in effect which no judge will in terms take upon himself, to reverse decisions that have been acted upon for centuries(*h*).

If, therefore, the present case had arisen in England since the statute of charitable uses, 43 Elizabeth, ch. 4, there can be no doubt that it would have been established as a valid be-

(*a*) *White vs. White*, 1 Bro. Ch. 12. *Attorney General vs. Downing*, Ambler, 550, 571. *Attorney General vs. Bowyer*, 3 Ves. 714, 727.

(*b*) *Anon.* 1 Ch. Cas. 287. *Attorney General vs. Platt*, Rep. temp. Finch, 221.

(*c*) *Attorney General vs. Peacock*, Rep. temp. Finch, 45. *Owens vs. Bean*, Rep. temp. Finch, 395. *Attorney General vs. Syderfin*, 1 Vern. 224. *Clifford vs. Francis*, 1 Freeman 330.

(*d*) *Attorney General vs. Bishop of Chester*, 1 Bro. Ch. 444.

(*e*) *Attorney General vs. Oglander*, 3 Bro. Ch. 166.

(*f*) *Attorney General vs. City of London*, 3 Bro. Ch. 171. S. C. 1 Ves. Jun. 243.

(*g*) *Case of Christ's College*, 1 W. Bl. 90. S. C. Ambler, 351. *Attorney General vs. Rye*, 2 Vern. 453. *Rivett's Case*, Moore, 890. *Attorney General vs. Burdet*, 2 Vern. 755. *Attorney General vs. Bowyer*, 3 Ves. Jun. 714. *Mills vs. Farmer*, 15 Merivale, 55. *Collinson's Case*, Hob. 136. *Moore*. 822.

(*h*) *Moggridge vs. Thackwell*, 7 Ves. 36, 87.

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quest, notwithstanding it is given to an unincorporated society(*a*). The only question would have been, whether it ought to be administered by a scheme under the direction of the court of chancery, or by the king himself, as *parens patriæ*, under his sign manual. As to this, the rule which has been drawn by lord Eldon, from a most learned and critical examination of all the authorities is, that where there is a bequest to *trustees* for charitable purposes, the disposition must be in chancery, under a scheme to be approved by a master; but where the object is charity, and *no trust is interposed*, it must be by the king, under his sign manual; for in such cases the king, as *parens patriæ*, is deemed the constitutional trustee(*b*):

But the statute of Elizabeth not being in force in Virginia at the time when the present will took effect, (it having been repealed by the legislature between the making of the will and the death of the testator), it becomes a material inquiry, how far the jurisdiction and doctrines of the court of chancery respecting charitable uses depends upon that statute, and whether, independent of it, the present donation can be upheld.

It is not easy to arrive at any satisfactory conclusion on this head. Few traces remain of the exercise of this jurisdiction in any shape prior to the statute of Elizabeth. The principal, if not the only cases now to be found, were decided in the courts of common law, and turned upon the question, whether the uses were void or not within the statutes against superstitious uses. One of the earliest cases is Porter's case(*c*); which was a devise of lands devisable by

(*a*) See also Bayley and Church *vs.* Attorney General, 2 Atk. 239. Owen *vs.* Bean, Rep. temp. Finch, 395. S. C. 2 Ventris, 349. Anon. 1 Ch. Cas. 267. West *vs.* Knight, 1 Ch. Cas. 135. Mayor, &c. of Reading *vs.* Lane, Duke, 81, and see Bridgman's Duke, 361, 436.

(*b*) Moggridge *vs.* Thackwell, 7 Ves. 36, 86. Paice *vs.* Archbishop of Canterbury, 14 Ves. 372. Attorney General *vs.* Herrich, Ambler, 712. Morice *vs.* Bishop of Durham, 9 Ves. 399. S. C. 10. Ves. 522, 541. Clifford *vs.* Francis, 1 Freeman, 330. Attorney General *vs.* Syderfin, 2 Freeman, 261. S. C. 1 Vern. 224. S. C. 7 Ves. 69, 70. 2 Maddock's Ch. 63. Highmore on Mortm. 250. 1 Bac. Abr. Charitable Uses, (E). Attorney General *vs.* Mathews, 2 Lev. 167.

(*c*) 1 Co. 22, b, in 34 and 35 Elizabeth. See also a like decision in Partridge

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custom to the testator's wife in fee, upon condition that she should assure the lands devised for the maintenance and continuance of a free school and certain almsmen and alms-women ; and it appeared that the heir had entered for condition broken, and conveyed the same lands to the queen. It was held that the use being for charity, was a good and lawful use, and not void by the statutes against superstitious uses, and that the queen might well hold the land for the charitable uses. - Lord Eldon in commenting on this case has observed, " it does not appear that this court (i. e. chancery) at that period had cognizance upon informations for the establishment of charities. Prior to the time of lord Ellesmere(a), as far as the tradition of times immediately following goes, there were no such informations as that upon which I am now sitting (i. e. an information to establish a charity); but they made out their case as well as they could by law"(b). So that the result of lord Eldon's researches on this point is, that until about the period of enacting the statute of Elizabeth, bills were not filed in chancery to establish charities ; and it is remarkable that sir Thomas Egerton and lord Coke, who argued Porter's case for the queen, though they cited many antecedent cases, refer to none which were not decided at law. And the doctrine established by Porter's case is, that if a *feoffment* is made to a general legal use, not superstitious, though indefinite, though no person is in esse who could be the *cestui que use*, yet the *feoffment* is good; and if the use was bad, the heir of the feoffor would be entitled to enter, the legal estate remaining in him(c). The absence therefore of all authority derived from equity decisions ; on an occasion when they would probably have been used, if existing ; certainly does very much favour the conclusion of lord Eldon ; and if we might hazard a conjecture,

vs. Walker, cited, 4 Co. 116, b. Martindale *vs.* Martin, Cro. Eliz. 288. Thetford School, 8 Co. 130.

(a) Sir Thomas Egerton was made lord chancellor in 39 Elizabeth, 1596, and was created lord Ellesmere in 1 James I. 1603.

(b) Attorney General *vs.* Bowyer, 3 Ves. 714, 726.

(c) 3 Ves. Jun. 726.

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it would be, that Porter's case having established charitable uses, not superstitious, to be good at law, chancery, in analogy to other cases of trusts, immediately held the *feoffees* to such uses accountable in equity for the due execution of them; and that the inconveniences felt in resorting to this new and anomalous proceeding, from the indefinite nature of some of the uses, gave rise within a very few years to the statute of 43 Elizabeth(a). This view would have a great tendency to reconcile the language used on other occasions by other chancellors, in reference to the jurisdiction of chancery over charities, with that of lord Eldon; as it would show that in cases of seafiments to charitable uses, bills to establish those uses might in fact have been introduced by lord Ellesmere about five years before the statute of Elizabeth; which might be quite consistent with the fact that such bills were not sustained where the donation was to charity generally, and no trust was interposed or legal estate devised to support the uses. And it is very certain that at law a devise to charitable uses generally, without interposing a trustee, or a devise to a non-existing corporation, or to an unincorporated society, would have been, and in fact was held, utterly void for want of a person having a sufficient capacity to take as devisee(b). The statute of Elizabeth in favour of charitable uses cured this defect(c), and provided (as we shall hereafter have occasion more immediately to consider) a new mode of enforcing such uses by a commission under the direction of the court of chancery. Shortly after this statute it became a matter of doubt whether the court could grant relief by original bill in cases within that statute, or was not confined to the remedy by commission. That doubt remained until the reign of Charles II. when it was settled in favour

(a) There was in fact an act passed respecting charitable uses in 39 Elizabeth, ch. 9; but it was repealed by the act of 43 Eliz. ch. 4. Com. Dig. Charitable Uses, N. 14.

(b) Anon. 1 Chan. Cas. 207. Attorney General *vs.* Tancred, 1 W. Bl. 90. S. C. Ambler, 351. Collinson's Case, Hob. 136. S. C. Moore, 888. Widmore *vs.* Woodroffe, Ambler, 636, 640. Com. Dig. Devise, K.

(c) Com. Dig. Charitable Uses, N. 11. Com. Dig. Chancery, 2, N. 10.

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of the jurisdiction by original bill(*a*). But on one occasion, in which this very question was argued before him, lord keeper Bridgman declared “that the king, as pater patriæ, may inform for any public benefit *for charitable uses, before the statute of 30 [43] of Elizabeth* for charitable uses; but it was doubted the court could not by bill take notice of that statute, so as to grant a relief according to that statute upon a bill(*b*).” On another occasion, soon afterwards, where the devise was to a college, and held void at law by the judges for a misnomer, and on a bill to establish the devise as a charity, the same question was argued; lord keeper Finch (afterwards lord Nottingham) held the devise good as an appointment under the statute of Elizabeth, and “decreed the charity, *though before the statute no such decree could have been made*(*c*).”

It would seem; therefore, to have been the opinion of lord Nottingham, that an original bill would not, before the statute of Elizabeth, lie to establish a charity where the estate did not pass at law, to which the charitable uses attached. In *Eyre vs. Shaftesbury*(*d*), sir Joseph Jekyll said, in the course of his reasoning on another point, “in like manner, in the case of charity, the king, pro bono publico, has an original right to superintend the care thereof, so that, abstracted from the statute of Elizabeth relating to charitable uses, and *antecedent to it, as well as since*, it has been every day’s practice to file informations in chancery in the attorney general’s name, for the establishment of charities.” In the *Bailiffs, &c. of Burford vs. Lenthall*(*e*), lord Hardwicke is reported to have said, “the courts have mixed the jurisdiction of bringing informations in the name of the attorney general, with the jurisdiction given them under the statute of Elizabeth, and proceed either way, according to their discretion.” In a

(*a*) *Attorney General vs. Newman*, 1 Ch. Cas. 157. S. C. 1 Lev. 284. *West vs. Knight*, 1 Ch. Cas. 134. *Anon.* 1 Ch. Cas. 267. 2 Fonb. Eq. b. 3, pl. 2, ch. I, s. 1. *Parish of St Dunstan vs. Beduchamp*, 1 Ch. Cas. 193.

(*b*) *Attorney General vs. Newman*, 1 Ch. Cas. 157.

(*c*) *Anon.* 1 Ch. Cas. 267.

(*d*) 2 P. Wms, 108, 118. Cited also, 7 Ves. Jun. 63, 87.

(*e*) 2 Atk. 550, 1743.

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subsequent case(a), which was an information filed by the attorney general against the master and governors of a school, calling them to account in chancery, as having the general superintendency of all charitable donations, the same learned chancellor, in discussing the general jurisdiction of chancery on this head, and distinguishing the case before him from others, because the trustees or governors were invested with the visitatorial power; said, "consider the nature of the foundation; it is at the petition of two private persons, by charter of the crown, which distinguishes this case from cases of the statute of Elizabeth on charitable uses, *or cases before that statute, in which this court exercised jurisdiction of charities at large.* Since that statute, where there is a charity for the particular purposes therein, and no charter given by the crown to found and regulate it, unless a particular exception out of the statute, it must be regulated by commission. But there may be a bill by information in this court, founded on its general jurisdiction; and that is from necessity, because there is no charter to regulate it, and the king has a general jurisdiction of this kind. There must be somewhere a power to regulate; but where there is a charter with proper powers, there is no ground to come into this court to establish that charity; and it must be left to be regulated in the manner the charter has put it, or by the original rules of law. Therefore, though I have often heard it said in this court, if an information is brought to establish a charity, and praying a particular relief and mode of regulation, and the party fails in that particular relief, yet that information is not to be dismissed, but there must be a decree for the establishment; that is, always with this distinction, *where it is a charity at large, or in its nature before the statute of charitable uses;* but not in the case of charities incorporated and established by the king's charter, under the great seal, which are established by proper authority allowed." And again, "it is true, that an information in the name of the attorney general, as an officer of the crown, was not a head of the statute of charitable uses, because that original jurisdic-

(a) Attorney General *vs.* Middleton, (1751). 2 Ves. 827.

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tion was exercised in this court before; but that was always in cases now provided for by that statute, that is, charities at large, not properly and regularly provided for in charters of the crown."

It was manifestly, therefore, the opinion of lord Hardwicke, that, independent of the statute of Elizabeth, the court of chancery did exercise original jurisdiction in cases of charities at large, which he explains to mean charities not regulated by charter; but it does not appear that his attention was called to discriminate between such as could take effect at law, by reason of the interposition of a feoffee or devisee capable of taking, and those where the purpose was *general charity*, without the interposition of any trust to carry it into effect; and the same remark applies to the dictum by sir Joseph Jekyll. In a still later case^(a), which was an information to establish a charity and aid a conveyance in remainder to *certain officers* of Christ's college to certain charitable uses, lord keeper Henley (afterwards lord Northington) is reported to have said, "the conveyance is admitted to be defective, the use being limited to certain officers of the corporation, and not to the corporate body; and therefore there is a want of proper persons to take in perpetual succession. The only doubt is, whether the court shall supply this defect for the benefit of the charity *under the statute of Elizabeth*. And I take the uniform rule of this court, *before, at and after* the statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, *the court will aid a defective conveyance to such uses*. Thus, though devises to corporations were void under the statute of Henry VIII., yet they were always considered as good in equity, if given to charitable uses." And he then proceeds to declare, that he is obliged, by the uniform course of precedents, to assist this conveyance, and therefore establishes *the conveyance expressly under the statute of Elizabeth*.

There is some reason to question, if the language here im-

(a) Attorney General *vs.* Tancred, 1 W. Bl. 90. S.C. Ambler, 361. 1 Eden's R. 10.

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puted to lord Northington be minutely accurate. His lordship manifestly aids the conveyance, as a charity, *in virtue* of the statute of Elizabeth; and there is no doubt that it has been the constant practice of the court since that statute, to aid defects in conveyances to charitable uses. But there is no case in which such defects were aided before that statute. The old cases, though arising before, were deemed to be within the reach of that statute, by its retrospective language, and expressly decided on that ground(a). And the very case put of devises to corporations, which are void under the statute of Henry VIII., and are held good solely by the statute of Elizabeth, shows that his lordship was looking to that statute; for it is plain, that a devise, void by statute, cannot be made good upon any principles of general law. What therefore is supposed to have been stated by him as being the practice *before* the statute, is probably founded in the mistake of the reporter. The same case is reported in Ambler, 351, where the language is, "the constant rule of the court has always been, where a person has a power to give, and makes a defective conveyance to charitable uses, to supply it as an appointment; as in Jesus' college, Collinson's case in Hobart, 136." Now Collinson's case was expressly held to be sustainable, only as an appointment, under the statute of Elizabeth; and this shows that the language is limited to cases governed by that statute.

In a very recent charity case, sir Arthur Piggott in argument said, "the difference between the case of individuals and that of charities, is founded on a principle which has been established ever since the statute of charitable uses, in the reign of Elizabeth, and has been constantly acted upon from those days to the present;" and lord Eldon adopted the remark, and said, "I am fully satisfied as to all the principles laid down in the course of this argument, and accede to them all." His lordship then proceeds to discuss the most material of the principles and cases from the time of Elizabeth, and

(a) Collinson's Case, Hob. 136, S. C. Moore, 888. Moore 822. Sir Thomas Middleton's Case, Moore, 889. Rivett's Case, Moore, 890, and the cases cited in Raithby's note to Attorney General *vs.* Rye, 2 Vern. 458. Duke, 74, 77, 83, 84. Bridg. Charit. 366, 379, 380, 370. Duke, 105 to 118.

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builds his reasoning, as indeed he had built it before, upon the supposition that the doctrine in chancery, as now established, rested mainly on that statute(*a*). And his lordship's opinion, in the case alluded to(*b*), when commenting on Porter's case, is entitled to the more weight, because it seems to have been given after a very careful examination of the whole judicial history of charities.

These are all the cases which the researches of the court and of counsel have enabled them to find, where the jurisdiction of chancery over charities antecedent to the statute of Elizabeth has been directly or incidentally discussed. The circumstance that no cases prior to that time can be found in equity; the tradition that has passed down to our own times, that original bills to establish charities were first entertained in the time of lord Ellesmere; and the fact that the cases immediately succeeding that statute, where devises, void at law, were held good as charities, might have been argued and sustained upon the general jurisdiction of the court, if it existed, and yet were exclusively argued and decreed upon the footing of that statute; do certainly afford a very strong presumption that the jurisdiction of the court to enforce charities, where no trust was interposed, and where no devisee was in esse, or where the charity was general and indefinite both as to persons and objects, mainly rests upon constructions (whether ill or well founded is now of no consequence) of that statute.

It is very certain, also, that since the statute of Elizabeth, no bequests are deemed within the authority of chancery to establish and regulate, except bequests for those purposes which that statute enumerates as charitable, or which, by analogies, are deemed within its spirit and intendment. A bequest may be in an enlarged sense charitable, and yet not within the purview of the statute. Charity, as the master of the rolls has justly observed, in its widest sense, denotes all the good affection men ought to bear towards each other; in its more restricted and common sense, relief to the poor.

(*a*) *Mills vs. Farmer*, 1 Merivale, 55, 86, 94, 100. *Moggridge vs. Thackwell*, 7 Ves. 36. *Attorney General vs. Bowyer*, 3 Ves. 714, 726.

(*b*) *Attorney General vs. Bowyer*, 3 Ves. 714, 726.

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In neither of these senses is it employed in the court of chancery (*a*). In that court it means such only as are within the letter and the spirit of the statute of Elizabeth; and therefore, where a testatrix bequeathed the residue of her personal estate to the bishop of D. to dispose of the same "to such objects of *benevolence and liberality* as the bishop in his own discretion shall most approve of," and appointed the bishop her executor; on a bill to establish the will and declare the residuary bequest void, the court held the bequest void upon the ground that objects of benevolence and liberality were not necessarily charitable within the statute of Elizabeth, and were therefore too indefinite to be executed. The court further declared, that no case had yet been decided in which the court had executed a charitable purpose, unless the will contained a description of that which the law acknowledges a charitable purpose, or devoted the property to purposes of charity in general, in the sense in which that word is used in the court. That the case was therefore the case of a trust of so indefinite a nature, that it could not be under the control of the court, so that the administration of it could be reviewed by the court, or if the trustee died, the court itself could execute the trust. That it fell therefore within the rule of the court that where a trust is ineffectually declared, or fails, or becomes incapable of taking effect, the party taking shall be a trustee, if not for those who were to take by the will, for those who take under the disposition of the law; and the residue was accordingly decreed to the next of kin.

So that it appears, since the statute of Elizabeth, the court of chancery will not establish any trusts for indefinite purposes of a benevolent nature, not charitable within the purview of that statute, although there be an existing trustee in whom it is vested; but will declare the trust void, and distribute the property among the next of kin: and yet, if there was an original jurisdiction in chancery over all be-

(*a*) *Morice vs. Bishop of Durham*, 9 Ves. 399. S. C. 10 Ves. 522. *Brown vs. Yeall*, 7 Ves. 59, note (*a*). *Moggridge vs. Thackwell*, 7 Ves. 36. *Attorney General vs. Bowyer*, 8 Ves. 714, 726. *Cox vs. Basset*, 3 Ves. 165.

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quests charitable in their own nature, and not superstitious, to establish and regulate them, independent of the statute, it is not easy to perceive why an original bill might not be sustained in such court to establish such bequest, especially where a trustee is interposed to effectuate it; for the statute does not contain any prohibition of such bequests. An argument may therefore be fairly drawn from this source against a general jurisdiction in chancery over charities of an indefinite nature prior to the statute.

And the statute itself may be resorted to as affording an additional argument in corroboration of the opinion already expressed. It begins by a recital that lands, goods, money, &c. &c. had been given, &c. heretofore to certain purposes, which it enumerates in detail, which lands, &c. had not been employed according to the charitable intent of the givers and founders, by reason of frauds, breaches of trusts, and negligence in those that should pay, deliver, and employ the same. It then enacts, that it shall be lawful for the lord chancellor, &c. to award commissions under the great seal to proper persons to inquire, by juries, of all and singular such gifts, &c. breaches of trusts, &c. in respect to such gifts, &c. *heretofore* given, &c. or which shall hereafter be given, &c. "to or for any, the charitable and godly uses before rehearsed;" and upon such inquiry, to set down such orders, judgments and decrees, as the lands, &c. may be duly and faithfully employed to and for such charitable uses before rehearsed, for which they were given; "which orders, judgments and decrees, not being contrary to the orders, statutes, or decrees of the donors or founders, shall stand firm and good according to the tenor and purpose thereof, and shall be executed accordingly, *until the same shall be undone and altered by the lord chancellor, &c. upon complaint by any party grieved, to be made to them.*" Then follow several provisions, excepting certain cases from the operation of the statute, which are not now material to be considered. The statute then directs the orders, &c. of the commissioners to be returned under seal into the court of chancery, &c. and declares that the lord chancellor, &c. shall, and may "*take such order for the due execution of all*

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or any of the said judgments, orders and decrees, as to them shall seem fit and convenient;" and lastly, the statute enacts that any person aggrieved with any such orders, &c. may complain to the lord chancellor, &c. for redress therein; and upon such complaint the lord chancellor, &c. may, by such course as to their wisdom shall seem meetest, the circumstances of the case considered, proceed to the examination, hearing and determining thereof; "and upon hearing thereof, shall and may *annul, diminish, alter, or enlarge* the said orders, judgments, and decrees of the said commissioners as to them shall be thought to stand with equity and good conscience, according to the true intent and meaning of the donors and founders thereof;" and may tax and award costs against the persons complaining with just and sufficient cause of the orders, judgments, and decrees before mentioned.(a)

From this summary statement of the contents of the statute, it is apparent that the authority conferred on the court of chancery in relation to charitable uses is very extensive; and it is not at all wonderful, considering the religious notions of the times, that the statute should have received the most liberal, not to say in some instances the most extravagant, interpretation. And it is very easy to perceive how it came to pass, that as power was given to the court in the most unlimited terms to *annul, diminish, alter or enlarge* the orders and decrees of the commissioners, and to sustain an original bill in favour of any party grieved by such order or decree, the court arrived at the conclusion that it might by original bill do that, in the first instance, which it certainly could do circuitously upon the commission(b). And, as in some cases, where the trust was for a definite object, and the trustee living, the court might, upon its ordinary jurisdiction over trusts, compel an execution of it by an ori-

(a) See the statute 43 Eliz. ch. 4, at large, 2 Inst. 707. Bridg. on Duke, Chanc. 1, pl. 1.

(b) See the Poor of St Dunstan *vs.* Beauchamp, 1 Cha. Cas. 193. 2 Inst. 711. Baillif, &c. of Euston *vs.* Lenthall, 2 Atk. 551. 15 Ves. 305.

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ginal bill, independent of the statute(*a*), we are at once let into the origin of the practice of mixing up the jurisdiction by original bill with the jurisdiction under the statute, which lord Hardwicke alluded to in the passage already quoted(*b*), and which at that time was inveterately established. And this mixture of the jurisdictions serves also to illustrate the remark of lord Nottingham in the case already cited(*c*); where, upon an original bill, he decreed a devise to charity, void at law, to be good in equity as an appointment, though before the statute of Elizabeth no such decree could have been made.

Upon the whole, it seems to me that the jurisdiction of the court of chancery over charities, where no trust is interposed, or there is no person in esse capable of taking, or where the charity is of an indefinite nature, is not to be referred to the general jurisdiction of that court, but sprung up after the statute of Elizabeth, and rests mainly on its provisions(*d*). This opinion is supported by the weight of authorities speaking to the point, and particularly by those of a very recent date, which appear to have been most thoroughly considered. The language too of the statute lends a confirmation to the opinion, and enables us to trace what would otherwise seem a strange anomaly to a legitimate origin. If so, there is no pretence that by the law of Virginia, at the period when this will took effect, the statute of Elizabeth was then in force; or that any court of equity of that state could sustain the bequest in equity as a charity, if it was void at law. And that it was void at law, cannot be seriously doubted; for the legatees were not then a corporate society capable of taking it(*e*); and it is a maxim that the legacy must take effect at the death of the testator,

(*a*) Attorney General *vs.* Dixie, 18 Ves. 519. Kirby Ravensworth Hospital, 15 Ves. 305. Green *vs.* Rutherford, 1 Ves. 462. Attorney General *vs.* Earl of Clarendon, 17 Ves. 491, 499. 2 Fonb. Eq. b. 63, pl. 2, ch. 1, s. 1, note (*a*). Cooper's Eq. Pl. 292.

(*b*) Baillifs, &c. of Barford *vs.* Leathall, 2 Atk. 550.

(*c*) Anon. 1 Ch. Cas. 267.

(*d*) See Cooper Eq. pl. 102, 103.

(*e*) Com. Dig. Devise, K. 1 Roll. Abridg. 609. Com. Dig. Chancery, 2, N. 1, &c.

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or be void at that time, and the right vest in another(a). And if a court of chancery could not in virtue of its general jurisdiction take cognizance of, or sustain the bequest in this suit, neither can the circuit court of the United States.

If we could surmount the objection already considered, that this bequest is under the present law of Virginia deemed void both in law and equity, and therefore incapable of being decreed by this court, we might entertain the other questions which have been made in this court. One of these questions is, whether this court, as a court of equity, has a right to administer any charities, the administration of which would properly belong to the government of Virginia as *parens patriæ*. It is certainly stated in books of authority, that the king, as *parens patriæ*, has the general superintendence of all charities not regulated by charter(b), which he exercises by the keeper of his conscience, the chancellor; and therefore the attorney general, at the relation of some informant, when it is necessary, files, *ex officio*, an information in the court of chancery to have the charity properly established. And it is added, that the jurisdiction thus exercised does not belong to the court of chancery as *a court of equity*, but *as administering the prerogative and duties of the crown*(c). It may be safely admitted that the government of a state, as *parens patriæ*, has a right to enforce all charities of a public nature, by virtue of its general superintending authority over the public interests, where no other person is entrusted with it; and it seems also to be held, that the jurisdiction vested by the statute of Elizabeth over charitable uses is personal to the lord chancellor, and not in his ordinary or extraordinary jurisdiction in chancery, like that, in short, which he exercises as to lunatics and idiots(d).

(a) Per Lord Hardwicke, *Widmore vs. Woodroffe*, Ambler, 636, 640.

(b) 8 Bl. Comm. 427. 2 Fonb. Eq. b. 2, pl. 2, ch. 1, s. 1, and note (a).

(c) Cooper's Eq. Pl. xxvii. 2 Fonb. Eq. b. 2, pl. 2, ch. 1, s. 1. Lord Falkland *vs. Bertie*, 2 Vern. 342. Mitf. Pl. 29. Bailiffs, &c. of Burford *vs. Lenthal*, 2 Atk. 551.

(d) Bailiffs of Burford *vs. Lenthal*, 2 Atk. 551. 2 Fonb. Eq. b. 3, pl. 2, ch. 1, s. 1, and note (a).

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It may also be admitted, that where money is given to charity generally and indefinitely, without trustees or objects selected, the king, as *parens patriæ*, is the constitutional trustee, and may apply it as he pleases under his sign manual, and not under a decree of chancery(*a*). Where, however, the execution is to be by a trustee with general or some objects pointed out, or to a trustee for indefinite and general charity, the court of chancery will take the administration of the trust(*b*). Whether in such a case upon an *original bill* to establish the charity, the lord chancellor acts as the personal delegate of the crown, administering its prerogative in analogy to the authority *personally* given to him by the statute of charitable uses under a commission; or whether as a court of equity in virtue of its general powers, may perhaps upon the authorities admit of some question; though my opinion is that it belongs to the court, as a court of equity, exercising jurisdiction to enforce a *trust* recognized and enforced by the law of the land; and I think this opinion is corroborated by the better authorities(*c*). Be this as it may, where there is a *trust* for a *definite* object, and the trust is in point of law sustainable, there seems no reason why a court of equity, as such, may not take cognizance of such trust at the suit of any competent party, whether the attorney general, or a private interested relator, as well as of any other trust whose execution is sought(*d*). If therefore by the law of Virginia the bequest in this case had been valid in law or equity, the trustees being marked out, and the objects being definite, there does not seem any reason why at their instance it might not have been exe-

(*a*) *Moggridge vs. Thackwell*, 7 Ves. 86, 83, 85, 86. *Mills vs. Farmer*, 1 Merivale, 55. *Paice vs. Archbishop of Canterbury*, 14 Ves. 364. *Attorney General vs. Mathews*, 2 Lev. 167.

(*b*) *Moggridge vs. Thackwell*, 7 Ves. 86, 86. *Mills vs. Farmer*, 1 Merivale, 55.

(*c*) *Id.* and *Paice vs. Archbishop of Canterbury*, 14 Ves. 364. *Attorney General vs. Wansey*, 15 Ves. 281. *Attorney General vs. Price*, 17 Ves. 371. *Waldo vs. Caley*, 16 Ves. 206.

(*d*) 2 *Fenb. Eq. b. 8, pl. 2, ch. 1, s. 1, note (a), s. 2, s. 3, note (i).* *Moggridge vs. Thackwell*, 7 Ves. 86. *Attorney General vs. Brewer's Company*, 1 Merivale, 495. *Attorney General vs. Bowyer*, 3 Ves. 714. 2 *Vern.* 387. *Attorney General vs. Newcomb*, 14 Ves. 1, 7. *White vs. White*, 7 Ves. 423.

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cuted in this as well as in any other court of equity. The court in such a case would carry into effect the intention of the testator; nothing would be left to its discretion; and it would therefore do precisely what a state court of chancery must do, acting as such, or administering the prerogative of the government as *parens patriæ*.

In respect to another question, whether the attorney general be not a necessary party to a bill in equity to establish a charity or carry it into effect, that must depend upon circumstances. If the charity be indefinite, or there be no trustees, or no persons competent to take, or the objects be of a general and public nature, it would clearly be proper that the government to whom the superintendency of such charities belongs, should be made a party to the bill by their attorney general. This seems to have been the general course established by the authorities (a). But where the charity is definite in its nature, and trustees are appointed to take or execute it, it is not perceived why a suit at the instance of such trustees may not properly be maintained without the government being a party (b).

Another question which has been discussed in the argument is, whether a court of equity sitting within one jurisdiction, can execute any charitable bequests for foreign objects in another jurisdiction; and it is said, in a technical sense, to be against the public policy of Virginia to sustain or execute such bequests. There is no statute of Virginia making such bequests void; and therefore, if against her policy, it can be only because it would be against the general policy of all states governed by the common law. The case of the Attorney General *vs.* The City of London (c), is relied on to establish the general proposition. It was an in-

(a) Cooper's Eq. Plead. 21, 22, 102, 163. Monill *vs.* Lawson, 2 Eq. Cas. Abr. 167, pl. 18. 4 Vin. 500, pl. 11. Attorney General *vs.* Pearse, 2 Atk. 87.

(b) Monill *vs.* Lawson, 2 Eq. Cas. Abridg. 167, pl. 13. 4 Vin. 500, pl. 11. Bridg. Duke, Charit. 385, 386. Chitty *vs.* Parker, 4 Bro. Ch. Cas. 38. Anon. 8 Atk. 276. Attorney General *vs.* Newcomb, 14 Ves. 1, 7. Waldo *vs.* Caley, 16 Ves. 206.

(c) 3 Bro. Ch. Cas. 171. S. C. 1 Ves. Jun. 243. Provost, &c. of Edinburgh *vs.* Aubrey, Ambler, 236. Oliphant *vs.* Hendrie, 1 Bro. Ch. Cas. 571.

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formation to establish a new scheme for a charity of Mr Boyle, who by his will in 1691 gave the residue of his fortune to be laid out by his executors for charitable and other pious and good uses, at their discretion, but recommended that the greater part should be laid out for the advancement of the christian religion among infidels. The charity had been established under a decree of the court, and the property conveyed to the city of London upon trust to lay out the rents and profits in the advancement of the christian religion, as the bishop of London, for the time being, and lord Burlington should appoint. The trustees appointed the rents and profits to be paid to an agent in London, for the college of William and Mary, in Virginia, for this purpose, that the college should maintain and educate in the christian religion so many Indian children, as far as the fund would go, and that the president, &c. thereof, should transmit accounts, and *should be subject to rules given them until altered.* This arrangement was ratified by the court. After the revolution, the present bill was filed for the purpose of taking away the charity from the college, because emancipated from the control of the court, and to have it disposed of by a new scheme. Upon hearing the cause a decree was made accordingly, upon the ground that the trusts to the college to convert neighbouring infidels ceasing for want of objects, (there being now, as the court said, no neighbouring infidels), the charity must be applied anew (a). There was also an intimation at the argument, that the corporation was not now an existing corporation, and at all events was not within the control of the court. But the ground of the decision was as above stated. It is observable in this case, that the charity of Mr Boyle was not in terms or substance limited to foreign countries or objects; but the application to foreign objects was originally under the decree of the court. It certainly then furnishes no argument against, but an argument in favour of the power of a court of equity, to apply even a *general* charity to *foreign* objects.

But we need not rest here. There are other cases directly

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in point, in which bequests for foreign charitable objects have been sustained in equity. In the Provost, &c. of Edinburgh *vs.* Aubury(*a*), there was a devise of three thousand five hundred pounds, south sea annuities, to the plaintiffs, to be applied to the maintenance of poor labourers residing in Edinburgh and the towns adjacent. Lord Hardwicke was of opinion, that he could not give any directions as to the distribution of the money, that belonging to another jurisdiction, that is, to some of the courts in Scotland; and therefore directed that the annuities should be transferred to such person as the plaintiffs should appoint, *to be applied to the trusts in the will*. So in Oliphant *vs.* Hendrie(*b*), where A. by will gave three hundred pounds to a religious society in Scotland, to be laid out in the purchase of heritable securities in Scotland, and the interest thereof to be applied to the education of twelve poor children, the court held it a good bequest. That case approaches very near to the case now at bar. In Campbell *vs.* Radnor(*c*), the court held a bequest of seven thousand pounds, to be laid out in the purchase of lands in Ireland, and the rents and profits distributed among poor persons in Ireland, &c. to be good and valid in law. In Curtis *vs.* Hutton(*d*), the court held a bequest of personal estate for the maintenance of a charity (a college) in Scotland, to be a valid bequest. In a still more recent case, a bequest of ten thousand pounds in trust with the magistrates of Inverness in Scotland, to apply the interest and income for the education of certain boys, was held a valid bequest(*e*). There is also another case(*f*), in which it was held that a legacy given towards establishing a bishop in America was held good, notwithstanding none was yet appointed; and the court directed the money to remain in court, until it should be seen whether any appointment should take place. Nor is the uniformity of the current of the authorities broken in upon by the doctrine

(*a*) Ambler, 226.

(*b*) 1 Bro. Ch. Cas. 571.

(*c*) 1 Bro. Ch. Cas. 171.

(*d*) 14 Ves. 537.

(*e*) Mackintosh *vs.* Townsend, 16 Ves. 330.

(*f*) Attorney General *vs.* Bishop of Chester, 1 Bro. Ch. Cas. 444.

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in *De Garcin vs. Lawson*(a). There, the bequests were to Roman Catholic establishments, or for the benefit of Roman Catholic priests, and were considered void, because they were illegal and contrary to the policy of England, evinced by the express enactments of statutes on this subject(b). It does not strike me, therefore, that there is any solid objection to the bequest in the case at bar, founded on the persons or objects being foreign to the state of Virginia.

But for the reasons already stated, the bequest being void, I am of opinion that the court ought to certify that opinion to the circuit court of Virginia.

(a) 4 Ves. Jun. 433, note.

(b) *Carey vs. Abbot*, 7 Ves. Jun. 490. *Highmore on Mortmain*, 1809, p. 34, &c.



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OR

PRINCIPAL MATTERS.

ACTION.

In England any instrument or claim, though not negotiable, may be assigned to the king, who can sue upon it in his own name. No valid objection is perceived against giving the same effect to an assignment to the government of this country. *The United States vs. Buford.* 30.

ADMIRALTY.

In admiralty cases a decree is not final, while an appeal from the same is depending in this court, and any statute which governs the case must be an existing valid statute at the time of affirming the decree below. *The United States vs. Preston.* 65.

AGENT AND PRINCIPAL.

1. C. & Co., merchants of Boston, owners of a ship proceeding on freight from Havana to the consignment of B. & Co. at Leghorn and to return to Havana, instructed B. & Co. to invest the freight, estimated at four thousand six hundred pesos; two thousand two hundred in marble tiles, and the residue, after paying disbursements, in wrapping paper. B. & Co. undertook to execute these orders. Instead however of investing two thousand two hundred pesos in marble, they invested all the funds which came into their hands in wrapping paper, which was received by the captain of the ship, and was carried to Havana, and there sold on account of C. & Co. and produced a loss, instead of the profit which would have resulted had the investment been made in marble tiles. As soon as information of the breach of orders was received, C. & Co. addressed a letter to B. & Co., expressing in strong terms their disapprobation of the departure from their orders, but did not signify their determination to disavow the transaction entirely, and consider the paper as sold on account of B. & Co. Held, that C. & Co. were enti-

AGENT AND PRINCIPAL.

- lied to recover damages for the breach of their orders; that their not having given notice to B. & Co. that the paper would be considered as sold on their account, did not injure their claim; and that the amount of the damages may be determined by the positive and direct loss arising plainly and immediately from the breach of the orders. *Bell et al. vs. Cunningham.* 69.
2. If the principal, after a knowledge that his orders have been violated by his agent, receives merchandise purchased for him contrary to orders, and sells the same without signifying any intention of disavowing the acts of the agent, an inference in favour of the ratification of the acts of the agent may fairly be drawn by the jury. But if the merchandise was received by the principal, under a just confidence that his orders to his agent had been faithfully executed, such an inference would be in a high degree unreasonable. *Ibid.* 81.
 3. The faithful execution of orders which an agent or correspondent has contracted to execute, is of vital importance in commercial transactions, and may often affect the injured party far beyond the actual sum misapplied. A failure in this respect may entirely break up a voyage and defeat the whole enterprize. Speculative damages dependent on possible, successive schemes, ought not to be given in such cases; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate. *Ibid.* 85.
 4. The jury, in an action for damages for breach of orders, may compensate the plaintiff for actual loss, and not give vindictive damages. The profits which would have been obtained on the sale of the article directed to be purchased, may be properly allowed as damages. *Ibid.* 86.
 5. The general rule is, that the principal is bound by the act of his agent no further than he authorizes that agent to bind him; but the extent of the power given to an agent is decided as well from facts as from express delegation. In the estimate or application of such facts, the law has regard to public security, and often applies the rule, "that he who trusts must pay." So also, collusion with an agent to get a debt paid through the intervention of one in failing circumstances, has been held to make the principal liable on the ground of immoral dealing. *Persons vs. Armor and Oakey.* 428.

ALEXANDRIA, DISTRICT OF COLUMBIA.

See the case of *Fowle vs. The Common Council of Alexandria,* 396, as to the powers of the corporation of Alexandria.

ALIEN, AND ALIENAGE.

See the cases of *Inglis vs. The Trustees of the Sailor's Snug Harbour,* 99, and *Shanks et al. vs. Dupont et al.* 242.

ALLEGIANCE.

1. What are the rights of the individuals composing a society, and living under the protection of the government, when a revolution occurs, a dismemberment takes place, and when new governments are formed, and new relations between the government and the people are established. A person born in New York before the 4th of July 1776, and who remained an infant with his father in the city of New York,

ALEGIANCE.

during the period it was occupied by the British troops; his father being a royalist and having adhered to the British government, and left New York with the British troops, taking his son with him, who never returned to the United States, but afterwards became a bishop of the episcopal church in Nova Scotia; such a person was born a British subject, and continued an alien, and is disabled from taking land by inheritance in the state of New York. *Inglis vs. The Trustees of the Sailor's Snug Harbour.* 126.

2. If such a person had been born after the 4th of July 1776, and before the 15th of September 1776, when the British troops took possession of the city of New York and the adjacent places, his infancy incapacitated him from making an election for himself, and his election and character followed that of his father; subject to the right of disaffirmance in a reasonable time after the termination of his minority; which never having been done, he remained a British subject, and disabled from inheriting land in the state of New York. *Ibid.* 126.
3. The rule as to the point of time at which the American *ante nati* ceased to be British subjects, differs in this country and in England, as established by the courts of justice in the respective countries. The English rule is to take the date of the treaty of peace in 1783. Our rule is to take the date of the declaration of independence. *Ibid.* 121.
4. The settled doctrine in this country is, that a person born here, but who left the country before the declaration of independence, and never returned here, became an alien and incapable of taking lands subsequently by descent. The right to inherit depends upon the existing state of allegiance at the time of the descent cast. *Ibid.* 121.
5. The doctrine of perpetual allegiance is not applied by the British courts to the American *ante nati*; and this court, in the case of Blight's Lessee *vs.* Rochester, 7 Wheat. 544, adopted the same rule with respect to the rights of British subjects here. That although born before the revolution, they are equally incapable with those born subsequent to that event of inheriting or transmitting the inheritance of lands in this country. *Ibid.* 121.
6. The British doctrine therefore is, that the American *ante nati*, by remaining in America after the peace, lost their character of British subjects; and our doctrine is, that by withdrawing from this country, and adhering to the British government, they lost, or perhaps more properly speaking, never acquired the character of American citizens. *Ibid.* 122.
7. The right of election must necessarily exist in all revolutions like ours, and is well established by adjudged cases. *Ibid.* 122.
8. This court in the case of M'Ilvaine's Lessee *vs.* Coxe, 4 Cranch, 211, fully recognized the right of election; but they considered that Mr Coxe had lost that right by remaining in the state of New Jersey, not only after she had declared herself a sovereign state, but after she had passed laws by which she declared him to be a member of, and in allegiance to the new government. *Ibid.* 124.
9. Allegiance may be dissolved by the mutual consent of the government, and its citizens or subjects. The government may release the governed from their allegiance. This is even the British doctrine. *Ibid.* 125.

ALLEGIANCE.

10. Thomas Scott, a native of South Carolina, died in 1782, intestate, seized of land on James Island, having two daughters, Anna and Sarah, both born in South Carolina before the declaration of independence. Sarah married D. P., a citizen of South Carolina, and died in 1802, entitled to one half of the estate. The British took possession of James Island and Charleston in February and May 1780; and in 1781 Ann Scott married Joseph Shanks, a British officer, and at the evacuation of Charleston in 1782, she went to England with her husband, where she remained until her death in 1801. She left five children born in England. They claimed the other moiety of the real estate of Thomas Scott, in right of their mother, under the ninth article of the treaty of peace between this country and Great Britain of the 19th of November 1794. Held, that they were entitled to recover and hold the same. *Shanks et al. vs. Dupont et al.* 242.
11. If Ann Scott was of age before December 1782, as she remained in South Carolina until that time, her birth and residence must be deemed to constitute her by election a citizen of South Carolina, while she remained in that state. If she was not of age then, under the circumstances of this case, she might well be deemed to hold the citizenship of her father; for children born in a country, continuing while under age in the family of the father, partake of his natural character as a citizen of that country. *Ibid.* 245.
12. All British born subjects whose allegiance Great Britain has never renounced, ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words of the treaty of 1794. *Ibid.* 250.
13. The capture and possession of James Island in February 1780, and of Charleston on the 11th of May in the same year, by the British troops, was not an absolute change of the allegiance of the captured inhabitants. They owed allegiance to the conquerors during their occupation; but it was a temporary allegiance, which did not destroy, but only suspended their former allegiance. *Ibid.* 246.
14. The marriage of Ann Scott with Shanks, a British officer, did not change or destroy her allegiance to the state of South Carolina, because marriage with an alien, whether friend or enemy, produces no dissolution of the native allegiance of the wife. *Ibid.* 246.
15. The general doctrine is, that no persons can, by any act of their own, without the consent of the government, put off their allegiance and become aliens. *Ibid.* 246.
16. The subsequent removal of Ann Shanks to England with her husband, operates as a virtual dissolution of her allegiance, and fixed her future allegiance to the British crown by the treaty of peace in 1783. *Ibid.* 246.
17. The treaty of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American states, were virtually absolved from all allegiance to the British crown; all those who then adhered to the British crown were deemed and held subjects of that crown. The treaty of peace was a treaty operating between states, and the inhabitants thereof. *Ibid.* 247.

AMENDMENT.

This court has repeatedly decided, that the exercise of the discretion of the court below, in refusing or granting amendments of pleadings or motions for new trials, affords no grounds for a writ of error. In overruling a motion for leave to withdraw a replication and file a new one, the court exercised its discretion; and the reason assigned, as influencing that discretion, cannot affect the decision. *The United States vs. Buford.* 31.

AMERICAN REVOLUTION.

For the effect of the American revolution on the rights of persons born in the British colonies in America before the revolution, and born in the United States during the revolution and before the treaty of peace, see, the cases of *Inglis vs. The Trustees of the Sailor's Snug Harbour*, 99, and *Shanks vs. Dupont*, 242.

APPEAL.

1. In admiralty cases a decree is not final while an appeal from the same is depending in this court, and any statute which governs the case must be an existing valid statute at the time of affirming the decree below. *The United States vs. Preston.* 65.
2. The Josefa Segunda, having persons of colour on board of her, was, on the 11th of February 1818, found hovering on the coast of the United States, and was seized and brought into New Orleans, and the vessel and the persons on board were libelled in the district court of the United States of Louisiana, under the act of congress of the 2d of March 1807. After the decree of condemnation below, but pending the appeal to this court, the sheriff of New Orleans went on, with the consent of all the parties to the proceedings, to sell the persons of colour as slaves, and sixty-five thousand dollars, the proceeds, were deposited in the registry of the court to await the final disposal of the law. By the tenth section of the act of the 30th of April 1818, the six first sections of the act are repealed, and no provision is made by which the condition of the persons of colour found on board a vessel hovering on the coast of the United States is altered from that in which they were placed under the act of 1807, no power having been given to dispose of them otherwise than to appoint some one to receive them. The seventh section of the act of 1818 confirms no other sales previously or subsequently made under the state laws, but those for illegal importation, and does not comprise the case of a condemnation under the seventh section. The final condemnation of the persons on board the Josefa Segunda took place in this court on the 18th of March 1820, after congress had passed the act of the 3d of March 1819, entitled, "an act in addition to an act prohibiting the slave trade," by the provisions of which persons of colour brought in under any of the acts prohibiting traffic in slaves, were to be delivered to the president of the United States to be sent to Africa. The condemnation could not affect them. *Ibid.* 66.
3. Where an appeal has been dismissed, the appellant having omitted to file a transcript of the record within the time required by the rule of court, an official certificate of the dismissal of the appeal may not be given by the clerk during the term. The appellant may file the transcript.

APPEAL.

with the clerk during the term, and move to have the appeal reinstated. To allow such a certificate would be to prejudge such a motion. *The Bank of the United States et al. vs. Stovann.* 68.

4. It is of great importance to the due administration of justice, and in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon *final decrees only*, that causes should not come up here in fragments or successive appeals. It would occasion very great delays and oppressive expenses. *Canter vs. The American and Ocean Insurance Company.* 807.

ASSUMPSIT.

When money of the United States has been received by one public agent from another public agent, whether it was received in an official or private capacity, there can be no doubt but that it was received to the use of the United States; and they may maintain an action of assumpsit against the receiver for the same. *The United States vs. Buford.* 28.

BARRATRY.

1. What is barratry. Its definition. *The Patapsco Insurance Company vs. Coulter.* 230.
2. The British courts have adopted the safe and legal rule, in deciding that where the policy covers the risk of barratry, and fire is the proximate cause of the loss, they will not sustain the defence that negligence was the remote cause, and will hold the assured liable for the loss. *Ibid.* 236.
3. The rule that a loss, the proximate cause of which is a peril insured against, is a loss within the policy, although the remote cause may be negligence of the master or mariners, has been affirmed in several successive cases in the English courts. *Ibid.* 237.

BILLS OF EXCHANGE.

1. F. at New Orleans was the correspondent of P. at Boston, received goods from him on consignment, and was from time to time directed to purchase produce, and ship the same to P., and was instructed to draw on P., for the funds to pay for the same. When he made purchases, "the bills of parcels were made out in the name of F., and the accounts assured in the books of the different merchants in his name." The general course of the business was, that P. sent out, in his own vessels, merchandise to F., which was sold by F., and F. at the request of P. purchased from merchants in New Orleans produce, and shipped the same as ordered by P.; and to put himself in funds for the same when necessary, drew bills of exchange on P., who had always, until the presentation of the bills on which this suit was brought, accepted and paid the same; but he did not in his purchases act under the idea that he was restricted in his purchases to the drawing of bills for the payment of the articles purchased for P. F. purchased a quantity of tobacco to be shipped to P.; and payment for the same in bills on P. made a particular part of the contract for the purchase. At the time of the purchase, F. showed to the vendor of the tobacco the letters from P. ordering the purchase and shipment of the same. Some of the bills drawn by F. on P., and which were delivered to the vendor of the tobacco in payment for the same, were refused acceptance and payment, and this suit

BILLS OF EXCHANGE.

- was instituted for the recovery of the amount of the bills from P. Held, that P. was not liable to pay the bills. *Parsons vs. Armor and Oakey.* 426.
2. A bill of exchange is the substitute for the actual transmission of money by sea or land. Power therefore to draw on a house in good credit, and to throw the bills upon the market, is equivalent to a deposit of cash in the vaults of the agent. There is not the least title of evidence in this cause to show that P. meant to use the credit of the drawer of the bills on which this suit is brought, or to authorise him to pledge his credit in any thing but the negotiation of the bills. This depended on the confidence which merchants of New Orleans who wished to remit would place in the solvency and integrity of the drawer and drawee; and had no connection whatever with the application of the money thus raised to the purchases ordered by the principal. As to those purchases, the agent was authorised to go no further than to apply the funds deposited with him. *Ibid.* 428.
 3. Of the general power to protest the bills of one who has overdrawn, there can be no question; for it is the only security which one who gives a power to draw bills, and throw them on the market, has against the bad faith of his correspondent. He takes the risk of paying the damages, if in fault; or of throwing them on the other, if he has actually abused his trust. It is a question between him and his correspondent. *Ibid.* 429.
 4. The currency which a merchant may give to bills drawn on him by a correspondent, by payment of such bills, does not deprive him of the security he has a right to, by refusing his acceptance of other bills so drawn. *Ibid.* 430.

BRITISH TREATY.

1. For the effect of the British treaties of 1783 and 1794, on the claims of British subjects born in America before the treaty of peace, see the case of *Inglis vs. The Trustees of the Sailor's Snug Harbour*, 99, and *Shanks et al. vs. Dupont et al.* 242.
2. Thomas Scott, a native of South Carolina, died in 1782, intestate, seized of land on James Island, having two daughters, Ann and Sarah, both born in South Carolina before the declaration of independence. Sarah married D. P. a citizen of South Carolina, and died in 1802, entitled to one half of the estate. The British took possession of James Island and Charleston in February and May 1780; and in 1781 Ann Scott married Joseph Shanks, a British officer, and at the evacuation of Charleston in 1782, she went to England with her husband, where she remained until her death in 1801. She left five children born in England. They claimed the other moiety of the real estate of Thomas Scott, in right of their mother, under the ninth article of the treaty of peace between this country and Great Britain of the 19th of November 1794. Held, that they were entitled to recover and hold the same. *Shanks et al. vs. Dupont et al.* 242.
3. All British-born subjects whose allegiance Great Britain has never renounced, ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words of the treaty of 1794. *Ibid.* 250.

BRITISH TREATY.

4. The treaty of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American states, were virtually absolved from all allegiance to the British crown; all those who then adhered to the British crown were deemed and held subjects of that crown. The treaty of peace was a treaty operating between states, and the inhabitants thereof. *Ibid.* 247.

CHANCERY.

1. The courts of the United States have equity jurisdiction to rescind a contract on the ground of fraud, after one of the parties to it has been proceeded against on the law side of the court, and a judgment has been obtained against him for a part of the money stipulated to be paid by the contract. *Boyce's Executors vs. Grundy.* 210.
2. It is not enough that there is a remedy at law: it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. *Ibid.* 215.
3. It cannot be doubted that reducing an agreement to writing is in most cases an argument against fraud; but it is very far from a conclusive argument. The doctrine will not be contended for, that a written agreement cannot be relieved against on the ground of false suggestions. *Ibid.* 214.
4. It is not an answer to an application to a court of chancery for relief in rescinding a contract, to say that the fraud alleged is partial, and might be the subject of compensation by a jury. The law, which abhors fraud, does not permit it to purchase indulgence, dispensation, or absolution. *Ibid.* 220.

CHARITABLE USES.

See the case of *Inglis vs. The Trustees of the Sailor's Snug Harbour*, 101, and Appendix, 481.

CHOSES IN ACTION, ASSIGNMENT OF,

Action.

CIRCUIT COURTS.

See the case of *Ex parte Tobias Watkins*, 193, for the jurisdiction of the circuit court of the district of Columbia in criminal cases.

CLERICAL ERROR.

A commission was issued in the name of Richard *M.* Meade, the name of the party being Richard *W.* Meade. This is a clerical error, and does not affect the execution of the commission. *Keene vs. Meade.* 6.

COLUMBIA, DISTRICT OF.

For the jurisdiction of the circuit court of the district of Columbia in criminal cases, see *Ex parte Tobias Watkins*, 193.

COMMISSION.

1. A commission was issued in the name of Richard *M.* Meade, the name of the party being Richard *W.* Meade. This is a clerical error in making out the commission, and does not affect the execution of the commission. *Keene vs. Meade.* 6.

COMMISSION.

2. It is not known that there is any practice in the execution or return of a commission, requiring a certificate, in whose hand writing the depositions returned with the commission were set down! All that the commission requires is, that the commissioners, having reduced the depositions taken by them to writing, should send them with the commission under their hands and seals to the judges of the court out of which the commission issued. But it is immaterial in whose hand writing the depositions are: and it cannot be required that they should certify any immaterial fact. *Keene vs. Meade*. 8.
3. A certificate by the commissioners, that A. B. whom they were going to employ as a clerk had been sworn, admits of no other reasonable interpretation than that A. B. was the person appointed by them as clerk. *Ibid.* 9.
4. It is not necessary to return with the commission the form of the oath administered by the commissioners to the witnesses. When the commissioners certify, the witnesses were sworn, and the interrogatories annexed to the commission were all put to them, it is presumed that they were sworn and examined as to all their knowledge of the facts. *Ibid.* 10.

COMMON LAW.

By "common law," the framers of the constitution of the United States meant, what the constitution denominated in the third article, "law;" not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were regarded, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit. *Parsons vs. Bedford et al.* 447.

CONDITION.

1. The testator was seised of a very large real and personal estate, in the states of Virginia, Kentucky, Ohio and Tennessee. After making, by his will, in addition to her dower, a very liberal provision for his wife, for her life, out of part of his real estate, and devising, in case of his having a child or children, the whole of his estate to such child or children, with the exception of the provision for his wife; and certain other bequests; his will declares: "in case of having no children, I then leave and bequeath all my real estate at the death of my wife, to William King, son of brother James King, on condition of his marrying a daughter of William Trigg's, and my niece Rachel his wife, lately Rachel Finlay; in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King's, or of sister Elizabeth's, wife to John Mitchell, and to their issue." The testator died without issue. He survived his father, and had brothers and sisters of the whole and half blood, who survived him, and also a sister of the whole blood, Elizabeth, the wife of John Mitchell, who died before him. William and Rachel Trigg never had a daughter, but

CONDITION.

had four sons. James King, the father of William King, the devisee, had only one daughter, who intermarried with Alexander McCall. Elizabeth, the wife of John Mitchell, had two daughters, both of whom are married, one to William Heiskill, the other to Abraham B. Trigg. *By the Court.* We have found no case in which a general devise in words, importing a present interest, in a will making no other disposition of the property, on a condition which may be performed at any time, has been construed, from the mere circumstance that the estate is given on condition, to require that the condition must be performed before the estate can vest. There are many cases in which the contrary principle has been decided. The condition on which the devise to William King depended, is a condition subsequent. *Finlay et al. vs. King's Lessee.* 377.

2. It is certainly well settled, that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the particular clause, or of the whole will, shows that the act upon which the estate depends must be performed before the estate can vest, the condition of course is precedent; and unless it is performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent. *Ibid.* 374.
3. It is a general rule, that a devise in words of the present time, as "I give to A. my lands in B," imports, if no contrary intent appears, an immediate interest, which vests in the devisee on the death of the testator. It is also a general rule, that if an estate be given on a condition for the performance of which no time is limited, the devisee has his life for performance. The result of these two principles seems to be, that a devise to A., on condition that he shall marry B., if uncontrolled by other words, takes effect immediately, and the devisee performs the condition, if he marry B. at any time during his life. The condition is subsequent. *Ibid.* 376.
4. As the devise in the will to William King was on a condition subsequent, it may be construed so far as respects the time of taking the possession, as if it had been unconditional. The condition opposes no obstacle to his immediate possession, if the intent of the testator shall require that construction. *Ibid.* 378.
5. The introductory clause in the will states, "I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing my worldly estate in the manner following." These words are entitled to considerable influence in a question of doubtful intent, in a case where the whole property is given, and the question arises between the heir and devisee respecting the interest devised. The words of the particular clause also carry the whole estate from the heir, but they fix the death of testator's wife as the time when the devisee shall be entitled to possession. They are "in case of having no children. I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King." The whole estate is devised to William King, but the possession of that part of it

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which is given to the wife or others for life, is postponed until her death. *Ibid.* 379.

CONSTITUTIONAL LAWS.

1. The plaintiff in error claimed to recover the land in controversy, having derived his title under a patent granted by the state of New York to John Cornelius. He insisted that the patent created a contract between the state and the patentee, his heirs and assigns, that they should enjoy the land free from any legislative regulations to be made in violation of the constitution of the state, and that an act passed by the legislature of New York, subsequent to the patent, did violate that contract. Under that act commissioners were appointed to investigate the contending titles to all lands held under such patents as that granted to John Cornelius, and by their proceedings, without the aid of a jury, the title of the defendants in error was established against, and defeating the title under a deed made by John Cornelius, the patentee, and which deed was executed under the patent. This is not a case within the clause of the constitution of the United States, which prohibits a state from passing laws which shall impair the obligation of contracts. The only contract made by the state is a grant to John Cornelius, his heirs and assigns, of the land. The patent contains no covenant to do or not to do any further act in relation to the land; and the court are not inclined to create a contract by implication. The act of the legislature of New York does not attempt to take the land from the patentee, the grant remains in full effect; and the proceedings of the commissioners under the law, operated upon titles derived under, and not adversely to the patent. *Hart vs. Lamphire.* 289.
2. It is within the undoubted powers of state legislatures, to pass recording acts by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within a limited time; and the power is the same whether the deed is dated before or after the recording act. Though the effect of such a deed is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law violating the obligation of contracts. So too is the power to pass limitation laws. Reasons of sound policy have led to the general adoption of laws of this description, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur, where the provisions of a law on these subjects may be so unreasonable as to amount to a denial of a right, and to call for the interposition of this court. *Ibid.* 290.

CONSTRUCTION OF STATE STATUTES.

1. It is the uniform rule of this court with respect to the title to real property, to apply the same rule which is applied in state tribunals in like cases. *Inglis vs. The Trustees of The Sailor's Snug Harbour.* 127.
2. The right of an absent and absconding debtor to real estate held adversely, passed to and became vested in the trustees by the act of the

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legislature of New York passed April 4, 1786, entitled "an act for relief against absconding and absent debtors. *Ibid.* 181.

3. Construction of the statute of limitations of Ohio. *M'Cluny vs. Silksman.* 270.

CONSTRUCTION OF STATUTES OF THE U. STATES.

1. The offence against the law of the United States, under the seventh section of the act of congress, passed the 2d day of March 1807, entitled "an act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States from and after the 1st of January 1808," is not that of importing or bringing into the United States persons of colour with intent to hold or sell such persons as slaves, but that of hovering on the coast of the United States with such intent; and although it forfeits the vessel and any goods or effects found on board, it is silent as to disposing of the coloured persons found on board, any further than to impose a duty upon the officers of armed vessels who make the capture to keep them safely, to be delivered to the overseers of the poor or the governor of the state or persons appointed by the respective states to receive the same. *United States vs. Preston.* 65.
2. The Josefa Segunda, having persons of colour on board of her, was, on the 11th of February 1818, found hovering on the coast of the United States, and was seized and brought into New Orleans, and the vessel and the persons on board were libelled in the district court of the United States of Louisiana, under the act of congress of the 2d of March 1807. After the decree of condemnation below, but pending the appeal to this court, the sheriff of New Orleans went on, with the consent of all the parties to the proceedings, to sell the persons of colour as slaves, and sixty-five thousand dollars, the proceeds, were deposited in the registry of the court to await the final disposal of the law. By the tenth section of the act of the 30th of April 1818, the six first sections of the act are repealed, and no provision is made by which the condition of the persons of colour found on board a vessel hovering on the coast of the United States is altered from that in which they were placed under the act of 1807, no power having been given to dispose of them otherwise than to appoint some one to receive them. The seventh section of the act of 1818 confirms no other sales previously or subsequently made under the state laws, but those for illegal importation, and does not comprise the case of a condemnation under the seventh section. The final condemnation of the persons on board the Josefa Segunda took place in this court on the 13th of March 1820, after congress had passed the act of the 3d of March 1819, entitled "an act in addition to an act prohibiting the slave trade," by the provisions of which persons of colour brought in under any of the acts prohibiting the traffic in slaves, were to be delivered to the president of the United States to be sent to Africa. It could not affect the persons of colour. *Ibid.* 66.
3. In admiralty cases a decree is not final while an appeal from the same is depending in this court, and any statute which governs the case must be an existing valid statute at the time of affirming the decree below. If, therefore the persons of colour, who were on board the Josefa Se-

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gunda when captured, had been specifically before the court on the 18th of March 1820, they must have been delivered up to the president of the United States to be sent to Africa, under the provisions of the act of the 3d of March 1819, and therefore there is no claim to the proceeds of their sale, under the law of Louisiana, which appropriated the same. The court do not mean to intimate that the United States are entitled to the money, for there was no power to sell the persons of colour. *Ibid.* 65.

Under the thirty-fourth section of the judiciary act of 1789, the acts of limitations of the several states, where no special provision has been made by congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts. *McCluny vs. Silliman.* 277.

CONTRACT.

Fraud. 1.

COPIES.

Certified copies of the opinions of the court, delivered in cases decided by the court, are to be given by the reporter; and not by the clerk of the court. *Anonymous.* 897.

CORPORATION.

1. The plaintiff placed goods in the hands of an auctioneer in the city of Alexandria, who sold the same, and became insolvent, having neglected to pay over the proceeds of the sales to the plaintiff. The auctioneer was licensed by the corporation of Alexandria, and the corporation had omitted to take from him a bond with surety for the faithful performance of his duties as auctioneer. This suit was instituted to recover from the corporation of Alexandria the amount of the sales of the plaintiff's goods, lost by the insolvency of the auctioneer, on an alleged liability, in consequence of the corporation having omitted to take a bond from the auctioneer. The power to license auctioneers, and to take bonds for their good behaviour, not being one of the incidents to a corporation, must be conferred by an act of the legislature; and in executing it, the corporate body must conform to the act. The legislature of Virginia conferred this power on the mayor, aldermen and commonalty of the several corporate towns within that commonwealth, of which Alexandria was then one; "provided that no such license should be granted until the person or persons requesting the same should enter into bond with one or more sufficient sureties, payable to the mayor, aldermen and commonalty of such corporation." This was a limitation of the power. *Fowle vs. The Corporation of Alexandria.* 407.
2. Though the corporate name of Alexandria was "the mayor and commonalty," it is not doubted that a bond taken in pursuance of the act would have been valid. *Ibid.* 407.
3. The act of congress of 1804, "an act to amend the charter of Alexandria," does not transfer generally to the common council, the powers of the mayor and commonalty; but the powers given to them are specially enumerated. There is no enumeration of the power to grant

CORPORATION.

- licenses to auctioneers. The act amending the charter, changed the corporate body so entirely as to require a new provision to enable it to execute the powers conferred by the law of Virginia. An enabling clause, empowering the common council to act in the particular case, or some general clause which might embrace the particular case, is necessary under the new organization of the corporate body. *Ibid.* 408.
4. The common council granted a license to carry on the trade of an auctioneer, which the law did not empower that body to grant. Is the town responsible for losses sustained by individuals from the fraudulent conduct of the auctioneer? He is not the officer or agent of the corporation, but is understood to act for himself as entirely as a tavern keeper, or any other person who may carry on any business under a license from the corporate body. *Ibid.* 409.
 5. Is a municipal corporation, established for the general purposes of government, with limited legislative powers, liable for losses consequent on its having misconstrued the extent of its powers, in granting a license which it had no authority to grant, without taking that security for the conduct of the person obtaining the license, which its own ordinances had been supposed to require, and which might protect those who transact business with the persons acting under the clause? The court find no case in which this principle has been affirmed. *Ibid.* 409.
 6. That corporations are bound by their contracts is admitted. That money corporations, or those carrying on business for themselves, are liable for torts is well settled. But that a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a nonfeasance, by an omission of the corporate body to observe a law of its own, in which no penalty is provided; is a principle for which we can find no precedent. *Ibid.* 409.

COSTS.

Costs and expenses are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court; and no appeal lies from a mere decree respecting costs and expenses. *Canter vs. The American and Ocean Insurance Company.* 319.

COURTS OF THE UNITED STATES.

1. This action was instituted in the district court of the United States for the eastern district of Louisiana, according to the forms of proceedings adopted and practised in the courts of that state. The cause was tried by a special jury, and a verdict was rendered for the plaintiff. On the trial, the counsel for the defendant moved the court to direct the clerk of the court to take down in writing the testimony of the witnesses examined in the cause, that the same might appear on record: such being the practice of the state courts of Louisiana; and which practice the counsel for the defendant insisted was to prevail in the courts of the United States, according to the act of congress of the 26th of May 1824; which provides, that the mode of proceeding in civil causes, in the courts of the United States established in Louisiana, shall be conformable to the laws directing the practice in the district court of the state, subject to such alterations as the judges of the courts of the

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United States should establish by rules. The court refused to make the order, or to permit the testimony to be put down in writing; the judge expressing the opinion, that the courts of the United States are not governed by the practice of the courts of the state of Louisiana. The defendant moved for a new trial, and the motion being overruled, and judgment entered for the plaintiff on the verdict, the defendant brought a writ of error to this court. Under the laws of Louisiana, on the trial of a cause before a jury, if either party desires it, the verbal evidence is to be taken down in writing by the clerk, to be sent to the supreme court, to serve as a statement of facts in case of appeal; and the written evidence produced on the trial is to be filed with the proceedings. This is done to enable the appellate court to *exercise the power of granting a new trial, and of revising the judgment of the inferior court.* Held, that the refusal of the judge of the district court of the United States to permit the evidence to be put in writing, could not be assigned for error in this court, the cause having been tried in the court below, and a verdict given on the facts by a jury; if the same had been put in writing, and been sent up to this court with the record, this court, proceeding under the constitution of the United States, and of the amendment thereto, which declares, "*no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law,*" is not competent to redress any error by granting a new trial. The proviso in the act of congress of the 26th of May 1824, ch. 181, demonstrates that it was not the intention of congress to give an absolute and imperative force to the state modes of proceeding in civil causes in Louisiana, in the courts of the United States; for it authorises the judge to modify them so as to adapt them to the organization of his own courts; and it further demonstrates that no absolute repeal was intended of the antecedent modes of proceeding authorised in the United States courts, under former acts of congress; for it leaves the judge at liberty to make rules, by which discrepancy between the state laws and the laws of the United States may be avoided. *Parsons vs. Bedford et al.* 444.

2. The act of congress having made the practice of the state courts the rule for the courts of the United States in Louisiana, the district court of the United States in that district is bound to follow the practice of the state; unless that court had adopted a rule superseding the practice. *Ibid.* 445.
3. It was not the intention of congress, by the general language of the act of 1824, to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial by a re-examination of the facts tried by a jury; and to enable it, after trial by jury, to do that, in respect to the courts of the United States sitting in Louisiana, which is denied to such courts sitting in all the other states of the union. *Ibid.* 447.
4. No court ought, unless the terms of an act of congress render it unavoidable, to give a construction to the act which should, however unintentional, involve a violation of the constitution. The terms of the act of 1824 may well be satisfied by limiting its operation to modes of practice and proceeding in the courts below, without changing the effect or conclusiveness of the verdict of a jury upon the facts litigated on the trial.

COURTS OF THE UNITED STATES.

The party may bring the facts into review before the appellate court, so far as they bear upon questions of law, by a bill of exceptions. If there be any mistake of the facts, the court below is competent to redress it, by granting a new trial. *Ibid.* 447.

COVERTURE.

See *Femes Covert.*

DAMAGES.

1. The faithful execution of orders which an agent or correspondent has contracted to execute, is of vital importance in commercial transactions, and may often affect the injured party far beyond the actual sum misspent. A failure in this respect may entirely break up a voyage and defeat the whole enterprise. Speculative damages dependent on possible, successive schemes, ought not to be given in such cases; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate. *Bell et al. vs. Cunningham et al.* 85.
2. The jury, in an action for damages for breach of orders, may compensate the plaintiff for actual loss, and not give vindictive damages. The profits which would have been obtained on the sale of the article directed to be purchased, may be properly allowed as damages. *Ibid.* 86.
3. The libellants, in their original libel in the district court of the United States for the district of South Carolina, prayed that certain bales of cotton might be decreed to them with *damages* and costs. Canter, who also claimed the cotton, prayed the court for restitution, with *damages* and costs. The district court decreed restitution of part of the cotton to the libellants, and dismissed the libel, without any award of *damages* on either side. Both parties appealed from this decree to the circuit court, where the decree of the district court was reversed, and restitution of all the cotton was decreed to Canter, with costs; *without any award of damages, or any express reservation of that question in the decree.* From this decree the libellants in the district court appealed to this court; no appeal was entered by Canter. Held, that the question of a claim of damages by Canter is not open before this court. The decree of restitution, without any allowance of damages, was a virtual denial of them, and a final decree upon Canter's claim of damages. It was his duty, at that time, to have filed a cross appeal, if he meant to rely on a claim to damages; and not having done so, it was a submission to the decree of restitution *and costs only.* This is not a proper case for the award of damages. The proceedings of the libellants were in the ordinary course to vindicate a supposed legal title. There is no pretence to say that the suit was instituted without probable cause, or was conducted in a malicious or oppressive manner. The libellants had a right to submit their title to the decision of a judicial tribunal, in any legal mode which promised them an effectual and speedy redress. Where parties litigate in the admiralty, and there was a probable ground for the suit or defence, the court considers the only compensation which the successful party is entitled to, is a compensation in costs and expenses. If the party has suffered any loss beyond

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these, it is *damnum absque injuria*. *Canter vs. The American and Ocean Insurance Company.* 318.

4. The settled practice of this court is, that whenever damages are claimed by the libellant or the claimant in the original proceedings, if a decree of restitution and costs only passes, it is a virtual denial of damages; and the party will be deemed to have waived the claim for damages, unless he then interposes an appeal or cross appeal to sustain that claim. *Ibid.* 318.
5. Counsel fees in, defending and prosecuting successfully a case of admiralty jurisdiction allowed as damages. *Ibid.* 307.

DEMURRER.

1. The party who demurs to evidence, seeks thereby to withdraw the consideration of the facts from the jury; and is therefore bound to admit not only the truth of the evidence, but every fact which that evidence may legally conduce to prove in favour of the other party. And if upon any view of the facts, the jury might have given a verdict against the party demurring, the court is also at liberty to give judgment against him. *Thornton vs. The Bank of Washington.* 36.
2. The defendant in the court below having withdrawn his cause from the jury by a demurral to evidence, or having submitted to a verdict for the plaintiff, subject to the demurral, cannot hope for a judgment in his favour, if by any fair construction of the evidence the verdict can be sustained. *Chinoweth et al. vs. The Lessee of Haskell et al.* 96.

DEVISE.

1. The testator gave all the rest and residue and remainder of his estate, real and personal, comprehending a large real estate in the city of New York, to the chancellor of the state of New York, and recorder of the city of New York, &c. (naming several other persons by their official description), to have and to hold the same unto them and their respective successors in office to the uses and trusts, subject to the conditions and appointments declared in the will; which were, out of the rents, issues and profits thereof, to erect and build upon the land upon which he resided, which was given by the will, an asylum, or marine hospital, to be called "the Sailor's Snug Harbour," for the purpose of maintaining and supporting aged, decrepid and worn out sailors, &c. And after giving directions as to the management of the fund by his trustees, and declaring that the institution created by his will should be perpetual, and that those officers and their successors should for ever continue the governors thereof, &c. he adds, "it is my will and desire that if it cannot legally be done according to my above intention, by them, without an act of the legislature, it is my will and desire that they will as soon as possible apply for an act of the legislature to incorporate them for the purpose above specified; and I do further declare it to be my will and intention, that the said rest, residue, &c. of my estate should be at all events applied for the uses and purposes above set forth; and that it is my desire all courts of law and equity will so construe this my said last will as to have the said estate appropriated to the above uses, and that the same should in no case, for want of legal form or otherwise, be so construed as that my relations, or any other persons, should heir, pos-

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sess or enjoy my property, except in the manner and for the uses herein above specified." Within five years after the death of the testator, the legislature of the state of New York, on the application of the trustees, also named as executors of the will, passed a law constituting the persons holding the offices designated in the will, and their successors, a body corporate, by the name of "The Trustees of the Sailor's Snug Harbour," and enabling them to execute the trusts declared in the will. This is a valid devise to divest the heir of his legal estate, or at all events to affect the lands in his hands with the trust declared in the will. If, after such a plain and unequivocal declaration of the testator with respect to the disposition of his property, so cautiously guarding against and providing for every supposed difficulty that might arise, any technical objection shall now be interposed to defeat his purpose; it will form an exception to what we find so universally laid down in all our books as a cardinal rule in the construction of wills, that the intention of the testator is to be sought after and carried into effect. If this intention cannot be carried into effect precisely in the mode at first contemplated by him, consistently with the rules of law, he has provided an alternative, which with the aid of the act of the legislature must remove every difficulty. *Inglis vs. The Trustees of the Sailor's Snug Harbour.*, 118.

2. In the case of "The Baptist Association vs. Hart's Executors," 4 Wheat. 27, the court considered the bequest void for uncertainty as to the devisees, and the property vested in the next of kin, or was disposed of by some other provisions of the will. If the testator in that case had bequeathed the property to the Baptist Association, on its becoming thereafter and within a reasonable time incorporated, could there be a doubt but that the subsequent incorporation would have conferred on the association the capacity of taking and managing the fund? *Ibid.* 114.
3. C. B. by her last will and testament devised "all her estate, real and personal, wheresoever and whatsoever in law or equity, in possession, reversion, remainder or expectancy, unto her executors and to the survivor of them, his heirs and assigns for ever," upon certain designated trusts: under the statute of wills of the state of New York, (1 N. Y. Revised Laws, 364,) all the rights of the testator to real estate, held adversely at the time of the decease of the testator, passed to the devisees by this will. *Ibid.* 127.
4. The testator was seized of a very large real and personal estate, in the states of Virginia, Kentucky, Ohio and Tennessee. After making, by his will, in addition to her dower, a very liberal provision for his wife, for her life, out of part of his real estate, and devising, in case of his having a child or children, the whole of his estate to such child or children, with the exception of the provision for his wife, and certain other bequests; his will declares: "In case of having no children, I then leave and bequeath all my real estate at the death of my wife, to William King, son of brother James King, on condition of his marrying a daughter of William Trigg's, and my niece Rachel his wife, lately Rachel Finlay; in trust for the eldest son or issue of said marriage; and in case such marriage should not take place; I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King's or of

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my sister Elizabeth's, wife to John Mitchell, and to their issue." The testator died without issue. He survived his father, and had brothers and sisters of the whole and half blood, who survived him, and also a sister of the whole blood, Elizabeth, the wife of John Mitchell, who died before him. William and Rachel Trigg never had a daughter, but had four sons. James King, the father of William King, the devisee, had only one daughter, who intermarried with Alexander M'Call. Elizabeth, the wife of John Mitchell, had two daughters, both of whom are married, one to William Heiskill, the other to Abraham B. Trigg. *By the Court.* We have found no case in which a general devise in words, importing a present interest, in a will making no other disposition of the property, on a condition which may be performed at any time, has been construed, from the mere circumstance that the estate is given on condition, to require that the condition must be performed before the estate can vest. There are many cases in which the contrary principle has been decided. The condition on which the devise to William King depended, is a condition subsequent. *Finlay vs. King's lessee.* 877.

5. It is certainly well settled, that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the particular clause, or of the whole will, shows that the act upon which the estate depends must be performed before the estate can vest, the condition of course is precedent; and unless it is performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent. *Ibid.* 874.
6. It is a general rule, that a devise in words of the present time, as "I give to A. my lands in B." imports, if no contrary intent appears, an immediate interest, which vests in the devisee on the death of the testator. It is also a general rule, that if an estate be given on a condition, for the performance of which no time is limited, the devisee has as life for performance. The result of these two principles seems to be, that a devise to A., on condition that he shall marry B., if uncontrolled by other words, takes effect immediately, and the devisee performs the condition, if he marry B. at any time during his life. The condition is subsequent. *Ibid.* 876.
7. As the devise in the will to William King was on a condition subsequent, it may be construed so far as respects the time of taking possession, as if it had been unconditional. The condition opposes no obstacle to his immediate possession, if the intent of the testator shall require that construction. *Ibid.* 878.
8. The introductory clause in the will states, "I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing my worldly estate in the manner following:" These words are entitled to considerable influence in a question of doubtful intent, in a case where the whole property is given, and the question arises between the heir and devisee respecting the interest devised. The words of the particular clause also carry the whole estate from the heir, but they fix the death of the testator's wife as the time

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when the devisee shall be entitled to possession. They are, "in case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King." The whole estate is devised to William King, but the possession of that part of it which is given to the wife or others for life, is postponed until her death. *Ibid.* 879.

3. **Quare.** Did William King take an estate which, in the events that have happened, enures to his own benefit; or is he, in the existing state of things, to be considered a trustee for the heirs of the testator? This question cannot be decided in this cause; it belongs to a court of chancery, and will be determined when the heirs shall bring a bill to enforce the execution of the trust. *Ibid.* 888.

DISCOUNT.

Interest, 1, 2, 3.

DUTIES ON MERCHANTS IMPORTED INTO THE UNITED STATES.

1. Priority of the United States.
2. Lien of the United States for duties.

EJECTMENT.

1. When a tenant disclaims to hold under his lease, he becomes a trespasser, and his possession is adverse, and as open to the action of his landlord as possession acquired originally by wrong. The act is conclusive on the tenant. He cannot revoke his disclaimer and adverse claim, so as to protect himself during the unexpired time of the lease. He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right. *Willison vs. Watkins.* 49.
2. If the tenant disclaims the tenure, claims the fee adversely in right of a third person or in his own right, or attorney to another, his possession then becomes a tortious one, by the forfeiture of his right, and the landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his devise of a day subsequent to the termination of the tenancy, for before that he had no right of entry. By bringing his ejectment he disclaims the tenancy and goes for the forfeiture. It shall not be permitted to the landlord to thus admit that there is no tenure subsisting between him and the tenant which can protect his possession from this adversary suit; and at the same time recover on the ground of there being a tenure so strong as that he cannot set up his adversary possession. *Ibid.* 49.
3. A mortgagee, or direct purchaser from the tenant, or one who buys his right at a sheriff's sale, assumes his relation to the landlord, with all its legal consequences, and is as much estopped from denying the tenancy. *Ibid.* 50.
4. It is an undoubted principle of law, fully recognized in this court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates with full force to prevent the tenant from violating

EJECTMENT.

- that contract by which he claimed and held the possession. He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord; who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination, by the lapse of time, or demand of possession. *Ibid.* 47.
5. The same principle applies to a mortgagor and mortgagees, trustee and cestui que trust, and generally, to all cases where one man obtains possession of real estate belonging to another by a recognition of his title. *Ibid.* 48.

ERROR.

Generally speaking, matters on practice in the inferior courts do not constitute subjects upon which errors can be assigned in the appellate court. *Parsons vs. Bedford et al.* 445.

ESTATES ON CONDITIONS.

Condition.

EVIDENCE.

1. Commission, 1, 2, 3, 4.
2. A witness, the clerk of the plaintiff, examined under a commission, stated the payment of a sum of money to have been made by him to the defendant, and that the defendant at his request made an entry in the plaintiff's rough cash book, writing his name at full length, and stating the sum paid to him, not so much for the sake of the receipt, as in order for him, the witness, to become acquainted with his signature, and the way of spelling his name. It is not necessary to produce the book in which the entry was made, and parol evidence of the payment of the money is legal. It cannot be laid down as a universal rule, that where written evidence of a fact exists, all parol evidence of the same fact is excluded. *Keene vs. Meade.* 7.
3. An account stated at the treasury department which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of congress. A treasury statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books. In these cases the officers may well certify, for they must have official knowledge of the facts stated. *The United States vs. Buford.* 29.
4. But when moneys come into the hands of an individual, not through the officers of the treasury, or in the regular course of official duty, the books of the treasury do not exhibit the facts, nor can they be known to the officers of the department. In such a case the claim of the United States for money thus in the hands of a third person must be established, not by a treasury statement, but by the evidence on which that statement was made. *Ibid.* 29.
5. On a trial in ejectment, the plaintiffs offered in evidence a number of entries of recent date, made by the defendants, within the bounds of the tract of land in dispute, designated as "Young's four thousand acres;" and attempted to prove, by a witness, that Young, when he made the entries, had heard of the plaintiffs' claim to the land. The defendants

EVIDENCE.

- then offered to introduce as evidence, official copies of entries made by other and third persons since the date of the plaintiff's grant, for the purpose of proving a general opinion, that the lands contained in the plaintiff's survey, made under the order of the court, after the commencement of the suit, were vacant at the date of such entries ; and to disprove notice to him of the identity of plaintiff's claim, when he made the entries under which he claimed. This evidence was unquestionably irrelevant. *Stringer et al. vs. The Lessee of Young et al.* 387.
6. Entries made subsequent to the plaintiffs' claim, whatever might have been the impression under which they were made, could not possibly affect the title held under a prior entry. *Ibid.* 387.
 7. The admission of evidence which was irrelevant, but which was not objected to, will not authorise the admission of other irrelevant evidence offered to rebut the same, when the same is objected to. *Ibid.* 387.
 8. Certified copies of the opinions of the court are to be given by the reporter : and not by the clerk of the court. *Anonymous.* 387.

FACTOR.

Agent and principal.

FEES.

The counsel fees allowed as expenses attending the prosecution of an appeal to the circuit court and to the supreme court, in an admiralty case. *Carter vs. The American and Ocean Insurance Company.* 307.

FEMES COVERT.

The incapacities of feme covert provided by the common law, apply to their civil right, and for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. These political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations. *Shanks et al. vs. Dupont.* 248.

FRAUD.

1. It cannot be doubted that reducing an agreement to writing is in most cases an argument against fraud ; but it is very far from a conclusive argument. The doctrine will not be contended for, that a written agreement cannot be relieved against on the ground of false suggestions. *Boyce's Executors vs. Grundy.* 219.
2. It is not an answer to an application to a court of chancery for relief in rescinding a contract, to say that the fraud alleged is partial, and might be the subject of compensation by a jury. The law, which abhors fraud, does not permit it to purchase indulgence, dispensation, or absolution. *Ibid.* 220.

HABEAS CORPUS.

1. A petition was presented by Tobias Watkins for a habeas corpus for the purpose of inquiring into the legality of his confinement in the gaol of the county of Washington, by virtue of a judgment of the circuit court of the United States of the district of Columbia, rendered in a criminal prosecution instituted against him in that court. The petitioner alleged

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- that the indictments under which he was convicted and sentenced to imprisonment, charge no offence for which the prisoner was punishable in that court, or of which that court could take cognizance; and consequently, that the proceedings were *coram non judice*. The supreme court has no jurisdiction in criminal cases which could reverse or affirm a judgment rendered in the circuit court in such a case, where the record is brought up directly by writ of error. *Ex parte Tobias Watkins*. 201.
2. The power of this court to award writs of habeas corpus is conferred expressly on the court by the fourteenth section of the judicial act, and has been repeatedly exercised. No doubt exists respecting the power. No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term used in the constitution is one which is well understood, and the judicial act authorises the court, and all the courts of the United States, and the judges thereof, to issue the writ "for the purpose of inquiring into the cause of commitment." *Ibid.* 201.
 3. The nature and powers of the writ of habeas corpus. *Ibid.* 202.
 4. The cases of the United States *vs.* Hamilton, 3 Dall. Rep. 17; *Ex parte Buford*, 3 Cranch's Rep. 447; *Ex parte Bollman and Swartwout*, 4 Cranch, 75; and *Ex parte Kearney*, 7 Wheat. 89; examined. *Ibid.* 207.

INSOLVENT LAWS OF THE STATES OF THE UNITED STATES.

The plaintiff below, a citizen of the state of Kentucky, instituted a suit against the defendant, a citizen of Louisiana, for the recovery of a debt incurred in 1808, and the defendant pleaded his discharge by the bankrupt law of Louisiana in 1811; under which, according to the provisions of the law, "as well his person as his future effects" were for ever discharged "from all the claims of his creditors." Under this law, the plaintiff, whose debt was specified in the list of the defendant's creditors, received a dividend of ten per cent on his debt, declared by the assignees of the defendant. Held, that the plaintiff, by voluntarily making himself a party to those proceedings, abandoned his extra-territorial immunity from the operation of the bankrupt law of Louisiana; and was bound by that law to the same extent to which the citizens of Louisiana were bound. *Clay vs. Smith*. 411.

INSURANCE.

1. Insurance on profits on board the ship Mary "at and from Philadelphia to Gibraltar and a port in the Mediterranean, not higher up than Marseilles, and from thence to Sonsonate in Guatemala, Pacific Ocean, with liberty of Guayaquil, the insurance to begin from the loading of the goods at Philadelphia, and to continue until the goods were safely landed at the said ports." The insurance, five thousand dollars, declared to be on profits, warranted to be American property, to be proved at Philadelphia only, valued at twenty thousand dollars." The vessel proceeded with a cargo of flour to Gibraltar, where the same was to be sold, and the proceeds invested at Marseilles in dry goods, to be sent from thence to Sonsonate or Guayaquil. While the vessel lay at Gib-

INSURANCE.

raltar, before the discharge of her cargo, she and her cargo were totally lost by fire. The evidence on the trial went to show, that with proper diligence on the part of the captain and crew, the fire might have been extinguished, and the vessel and cargo saved. Soon after the fire commenced, the captain called upon the crew to leave the ship, under an apprehension from a small quantity of gunpowder on board; and after they left her she was boarded by other persons, who endeavoured without success to extinguish the flames, having, as was alleged, arrived too late. Evidence was given, intended to show that the fire originated from the carelessness of the captain. The circuit court refused to instruct the jury that if the fire proceeded from the carelessness or negligence of the captain, the insured could not recover. The court also refused to instruct the jury that if the fire originated from accident, or without any want of due care on the part of the master and crew, and if the jury should find that by reasonable and proper exertions the vessel and cargo might have been preserved by them, which they omitted, the assured could not recover. That court also refused to instruct the jury that the assured, having offered no evidence that the sales of the flour at Gibraltar would have yielded a profit, they were not entitled to recover. Held, that there was no error in these instructions. *The Patapsco Insurance Company vs. Coulter.* 280.

2. What is barratry. Its definition. *Ibid.* 280.
3. The British courts have adopted the safe and legal rule, in deciding that where the policy covers the risk of barratry, and fire is the proximate cause of the loss, they will not sustain the defence that negligence was the remote cause, and will hold the assurers liable for the loss. *Ibid.* 286.
4. The rule that a loss, the proximate cause of which is a peril insured against, is a loss within the policy, although the remote cause may be negligence of the master or mariners, has been affirmed in several successive cases in the English courts. *Ibid.* 287.
5. It seems difficult to perceive, if profit be a mere excrescence of the principal, as some judges have said; or identified with it, as has been said by others; why the loss of the cargo should not carry with it the loss of the profits. Proof that profits would have arisen on the voyage, in order to recover on a policy on profits, is not required if the cargo has been lost. *Ibid.* 241.

INTEREST.

1. The taking of interest in advance upon the discount of a note in the usual course of business by a banker, is not usury. This has been long been settled, and is not now open for controversy. *Thornton vs. The Bank of Washington.* 40.
2. The taking of interest for sixty-four days on a note is not usury, if the note given for sixty days, according to the custom and usage in the banks at Washington, was not due and payable until the sixty-fourth day. In the case of *Renner vs. The Bank of Columbia,* 9 Wheat. 581, it was expressly held, that under that custom the note was not due and payable before the sixty-fourth day, for until that time the maker could not be in default. *Ibid.* 40.
3. Where it was the practice of the party, who had a sixty day note discount-

INTEREST.

ed at the bank of Washington, to renew the note by the discount of another note on the sixty-third day, the maker not being in fact bound to pay the note according to the custom prevailing in the district of Columbia; such a transaction on the part of the banker is not usurious, although on each note the discount for sixty-four days was deducted. Each note is considered as a distinct and substantive transaction. If no more than legal interest is taken upon the time the new note has to run, the actual application of the proceeds of the new note to the payment of the former note before it comes due, does not of itself make the transaction usurious. Something more must occur. There must be a contract between the bank and the party at the time of such discount, that the party shall not have the use and benefit of the proceeds until the former note becomes due, or that the bank shall have the use and benefit of them in the mean time. *Ibid.* 40.

JURISDICTION.

1. The plaintiff below claimed more than two thousand dollars in his declaration, but obtained a judgment for a less sum. The jurisdiction of this court depends on the sum or value in dispute between the parties, as the case stands upon the writ of error in this court; not on that which was in dispute in the circuit court. *Gordon vs. Ogden.* 84.
2. If the writ of error be brought by the plaintiff below, then the sum which the declaration shows to be due may be still recovered, should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is still in dispute. *Ibid.* 34.
3. But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the circuit court, and consequently the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties. *Ibid.* 34.
4. A judgment in its nature concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world, as the judgment of this court would be. It is as conclusive on this court as on other courts. It puts an end to inquiry concerning the fact, by deciding it. *Ex parte Tobias Watkins.* 202.
5. With what propriety can this court look into an indictment found in the circuit court, and which has passed into judgment before that court? We have no power to examine the proceedings on a writ of error, and it would be strange, if under colour of a writ to liberate an individual from an unlawful imprisonment, the court could substantially reverse a judgment which the law has placed beyond its control. An imprisonment under a judgment cannot be unlawful; unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. *Ibid.* 203.
6. The circuit court for the district of Columbia is a court of record, having general jurisdiction over criminal cases. An offence cognizable in any court is cognizable in that court. *Ibid.* 203.
7. If the offence be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine

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- whether the offence charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of its jurisdiction, whether its judgment be for or against the prisoner. The judgment is equally binding in one case and in the other, and must remain in full force, unless reversed regularly by a superior court capable of reversing it. If this judgment is obligatory, no court can ever look behind it. *Ibid.* 208.
8. Had any offence against the laws of the United States been in fact committed, the circuit court for the district of Columbia could take cognizance of it. The question whether any offence was committed, or was not committed; that is, whether the indictment did or did not show that an offence had been committed, was a question which this court was competent to decide. If its judgment was erroneous, a point which this court does not determine, still it is a judgment; and until reversed, cannot be disregarded. *Ibid.* 208.
9. It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown on the pleadings, are yet binding on all the world, and that this apparent want of jurisdiction can avail the party only on a writ of error. The judgment of the circuit court in a criminal case is of itself evidence of its own legality, and requires for its support no inspection of the indictment on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. This court cannot usurp that power by the instrumentality of a writ of habeas corpus. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied. *Ibid.* 207.
10. This court has been often called upon to consider the sixteenth section of the judiciary act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. *Boye's Executors vs. Grundy.* 210.
11. The courts of the United States have equity jurisdiction to rescind a contract on the ground of fraud, after one of the parties to it has been proceeded against on the law side of the court, and a judgment has been obtained against him for a part of the money stipulated to be paid by the contract. *Ibid.* 210.
12. It is not enough that there is a remedy at law: it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. *Ibid.* 215.
13. Where the point in which the judges of the circuit court differed in opinion was not certified, but the point of difference was to be ascertained from the whole record, the court refused to take jurisdiction of the case. *D'Wolf vs. Usher.* 269.
14. This court has no authority, on a writ of error from a state court, to declare a state law void on account of its collision with a state constitution; it not being a case embraced in the judiciary act, which gives the power of a writ of error to the highest judicial tribunal of the state. *Jackson vs. Lamphire.* 288.
15. The plaintiff in error claimed to recover the land in controversy, having

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- derived his title under a patent granted by the state of New York to John Cornelius. He insisted that the patent created a contract between the state and the patentee, his heirs and assigns, that they should enjoy the land free from any legislative regulations to be made in violation of the constitution of the state, and that an act passed by the legislature of New York, subsequent to the patent, did violate that contract. Under that act commissioners were appointed to investigate the contending titles to all the lands held under such patents as that granted to John Cornelius, and by their proceedings, without the aid of a jury, the title of the defendants in error was established against, and defeating the title under a deed made by John Cornelius, the patentee, and which deed was executed under the patent. This is not a case within the clause of the constitution of the United States, which prohibits a state from passing laws which shall impair the obligation of contracts. The only contract made by the state is a grant to John Cornelius, his heirs and assigns, of the land. The patent contains no covenant to do or not to do any further act in relation to the land; and the court are not inclined to create a contract by implication. The act of the legislature of New York does not attempt to take the land from the patentee, the grant remains in full effect; and the proceedings of the commissioners under the law, operated upon titles derived under, and not adversely to the patent. *Ibid.* 289.
16. It is within the undoubted powers of state legislatures, to pass recording acts by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within a limited time; and the power is the same whether the deed is dated before or after the recording act. Though the effect of such a deed is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law violating the obligation of contracts. So too is the power to pass limitation laws. Reasons of sound policy have led to the general adoption of laws of this description, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur, where the provisions of a law on these subjects may be so unreasonable as to amount to a denial of a right, and to call for the interposition of this court. *Ibid.* 290.
17. It has often been decided in this court, that it is not necessary that it shall appear, in terms, upon the record, that the question was presented in the state court, whether the case was within the purview of the twenty-fifth section of the judicial act of 1789, to give jurisdiction to this court in a case removed from a state court. It is sufficient, if, from the facts stated, such a question must have arisen, and the judgment of the state court would not have been what it is, if there had not been a misconstruction of some act of congress, &c. &c. or a decision against the validity of the right, title, privilege, or exemption set up under it. *Harris vs. Dennis.* 292.
18. Where the verdict for the plaintiff in the circuit court is for a less amount than two thousand dollars, and the defendant prosecutes the writ of error,

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this court has not jurisdiction; although the demand of the plaintiff in the suit exceeded two thousand dollars. *Smith vs. Honey.* 469.

LANDLORD AND TENANT.

1. It is an undoubted principle of law, fully recognized by this court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates with full force to prevent the tenant from violating the contract by which he claimed and held the possession. He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination, by the lapse of time or demand of possession. *Wilkinson vs. Watkins.* 47.
2. The same principle applies to a mortgagor and mortgagee, trustee and cestui que trust, and generally, to all cases where one man obtains possession of real estate belonging to another by a recognition of his title. *Ibid.* 48.
3. In no instance has the principle of law which protects the relations between landlord and tenant, been carried so far as in this case, which presents a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession afterwards for such a length of time, that the act of limitations has run out four times before he has done any act to assert his right to the land. *Ibid.* 48.
4. If no length of time would protect a possession originally acquired under a lease, it would be productive of evils truly alarming, and we must be convinced beyond a doubt that the law is so settled, before we would give our sanction to such a doctrine; and this is not the case upon authorities. *Ibid.* 51.
5. Where a tenant disclaims to hold under his lease, he becomes a trespasser, and his possession is adverse, and as open to the action of his landlord as a possession acquired originally by wrong. The act is conclusive on the tenant. He cannot revoke his disclaimer and adverse claim, so as to protect himself during the unexpired time of the lease. He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right. *Ibid.* 49.
6. If the tenant disclaims the tenure, claims the fee adversely in right of a third person or in his own right, or attorney to another, his possession then becomes a tortious one, by the forfeiture of his right, and the landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his demise of a day subsequent to the termination of the tenancy, for before that he had no right of entry. By bringing his ejectment he disclaims the tenancy and goes for the forfeiture. It shall not be permitted to the landlord to thus admit that there is no tenure subsisting between him and the tenant which can protect his possession from this adversary suit; and at the same time recover on the ground of there' being a tenure so strong as that he capnot set up his adversary possession. *Ibid.* 49.

LANDLORD AND TENANT.

7. A mortgagee, or direct purchaser from a tenant, or one who buys his right at a sheriff's sale, assumes his relation to the landlord, with all its legal consequences, and is as much estopped from denying the tenancy
Ibid. 50.

LANDS AND LAND TITLES.

1. It is an obvious principle that a grant must describe the land to be conveyed, and that the subject granted must be identified by the description given of it in the instrument itself. The description of the land consists of the courses and distances run by the surveyor, and of the marked trees at the lines and corners, or other natural objects which ascertain the very land which was actually surveyed. *Chinoweth et al. vs. The Lessee of Haskell.* 96.
2. If a grant be made which describes the land granted by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given, and must be used. *Ibid.* 96.
3. The line which forms the western boundary of the land intended to be granted was never run or marked. In his office the surveyor assumed a course and distance, and terminated the line at two small chestnut oaks. But where are we to look for those two small chestnut oaks in a wilderness in which one man takes up fifty thousand acres and another one hundred thousand? or how are we to distinguish them from other chestnut oaks. The guide, and the only guide given us by the surveyor or by the grant, is the course and distance. *Ibid.* 96.
4. It is admitted that the course and distance called for in a grant may be controlled and corrected by other objects of description which show that the survey actually covered other ground than the lines of the grant would comprehend. *Ibid.* 98.
5. On a trial in ejectment for lands in Virginia, the plaintiffs offered in evidence a number of entries of recent date, made by the defendants; within the bounds of the tract of land in dispute, designated as "Young's four thousand acres;" and attempted to prove, by a witness, that Young, when he made the entries, had heard of the plaintiffs' claim to the land. The defendants then offered to introduce, as evidence, official copies of entries made by other and third persons since the date of the plaintiffs' grant; for the purpose of proving a general opinion, that the lands contained in the plaintiffs' survey, made under the order of the court, after the commencement of the suit, were vacant at the date of such entries; and to disprove notice to him of the identity of plaintiff's claim, when he made the entries under which he claimed. This evidence was unquestionably irrelevant. *Stringer et al. vs. The Lessee of Young.* 337.
6. Entries made subsequent to the plaintiffs' claim, whatever might have been the impression under which they were made, could not possibly affect the title held under a prior entry. *Ibid.* 337.
7. The land law of Virginia directs that, within three months after a survey is made, the surveyor shall enter the plat and certificate thereof in a book, well bound, to be provided by the court of his county, at the county charge. After prescribing this, among other duties, the law proceeds to enact, that any surveyor failing in the duties aforesaid, shall

LAND AND LAND TITLES.

- be liable to be indicted. The law, however, does not declare that the validity of such survey shall depend in any degree on its being recorded. *Ibid.* 388.
8. The chief surveyor appoints deputies at his will; and no mode of appointment is prescribed. The survey made by his deputy is examined and adopted by himself, and is certified by himself, to the register of the land office. He recognizes the actual surveyor as his deputy in that particular transaction, and this, if it be unusual or irregular, cannot affect the grant. *Ibid.* 340.
9. Objections, which are properly overruled when urged against a legal title, in support of an equity, dependent entirely on a survey of land for which a patent had been issued, can have no weight when urged against a patent regularly issued in all the forms of law. *Ibid.* 340.
10. In Virginia the patent is the completion of the title, and establishes the performance of every pre-requisite. No inquiry into the regularity of these preliminary measures, which ought to precede it, is made in a trial at law. No case has shown that it may be impeached at law; unless it be for fraud,—not legal and technical, but actual and positive fraud, in fact, committed by the person who obtained it; and even this is questioned. *Ibid.* 340.
11. It is admitted to have been indispensably necessary to the plaintiffs' action to show a valid title to the land in controversy; and that the defendants were at liberty to resist the testimony, by any evidence tending in any degree to disprove this identity. But the defendants were not at liberty to offer evidence having no such tendency, but which might either effect a different purpose, or be wholly irrelevant. The question of its relevancy must be decided by the court; and any error in its judgment would be corrected by an appellate tribunal. The court cannot perceive that the omission of the surveyor to record the survey, or the fact that the survey was made by a person not a regular deputy, had any tendency to prove that the land described in the patent was not the land for which the suit was instituted. *Ibid.* 342.
12. The warrant for the land in controversy was entered with the surveyor of Monongalia county on the 7th of April 1784. At the May session of that year, the general assembly of Virginia divided the county of Monongalia, and erected a new county, to take effect in July, by the name of Harrison. The land on which the plaintiffs' warrant was entered, lay in the new county. The certificate of survey is dated in December 1784, and in accordance with the entry, states the land to be in Monongalia. The land law of Virginia enacts that warrants shall be lodged with the surveyor of the county in which the lands lie, and that the party shall direct the location specifically and precisely. It also directs despatch in the survey of all lands entered in the office. No provision is made for the division of a county between the entry and the survey. The act establishing the county of Harrison, does not direct that the surveyor of Monongalia county shall furnish the surveyor of Harrison with copies of the entries of lands which lay in the new county, and with the warrants on which they were made. In this state of things the survey of the land in controversy was made by the surveyor of Monongalia; the plat and certificate on which the patent was afterwards issued, were transmitted to the land office, and the patent described the land as in Monongalia county. No change was made in the law until 1798. This will not

LAND AND LAND TITLES.

- annul the patent, or deprive the unoffending patentee of his property. *Ibid.* 849.
18. The misnomer of a county, in a patent for land, will not vacate the patent. It will admit of explanation, and if explanation can be received, the patent on which the misnomer is found, is not absolutely void. *Ibid.* 844.

LEX LOCI.

It is a well settled principle that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction. *M'Cluny vs. Silliman.* 270.

LIEN OF THE UNITED STATES FOR DUTIES.

1. The United States have no general lien on merchandize, the property of the importer, for duties due by him upon other importations. The only effect of the first provision in the sixty-second section of the act of 1799, ch. 128, is that the delinquent debtor is denied at the custom house any further credit for duties until his unsatisfied bonds are paid. He is compellable to pay the duties in cash, and upon such payment he is entitled to the delivery of the goods imported. The manifest intention of the remaining clause in the section, is to compel the original consignee to enter the goods imported by him. *Harris vs. Den-nie.* 802.
2. No person but the owner or original consignee, or in his absence or sickness, his agent or factor, is entitled to enter the goods at the custom house, or give bond for the duties, or to pay the duties. Upon the entry the original invoices are to be produced and sworn to; and the whole objects of the act would be defeated by allowing a mere stranger to make the entry, or take the oath prescribed on the entry. *Ibid.* 304.
3. The United States having a lien on goods imported for the payment of the duties accruing on them, and which have not been secured by bond, and being entitled to the custody of them from the time of their arrival in port until the duties are paid or secured; any attachment by a state officer is an interference with such lien and rights to custody; and, being repugnant to the laws of the United States, is void. *Ibid.* 305.
4. The acknowledgement by the custom house store keeper, that he holds goods, upon which the duties have not been secured or paid, subject to an attachment issued out of a state court at the suit of a creditor of the importer, was a plain departure from his duty, and is not authorised by the law of the United States, and cannot be admitted to vary the rights of the parties. *Ibid.* 305.

LIMITATION OF ACTIONS.

1. B. a deputy commissary general of the United States received from M. a deputy quarter master general of the United States the sum of \$10,000, and acknowledged the same by a receipt signed by him with his official description. The United States had a right to treat M. as their agent in the transaction, by making B. their debtor, and to an action brought against him for money had and received, the statute of limitations is no bar. *The United States vs. Buford.* 29.

LIMITATION OF ACTIONS.

2. Where, before the transfer to the United States of an instrument which was the evidence of debt, the term of five years had elapsed, the period after which the statute of limitations was a bar, it can require no argument to show that the transfer of such claim to the United States cannot give it greater validity than it possessed before the transfer. *Ibid.* 30.
3. If no length of time would protect a possession originally acquired under a lease, it would be productive of evils truly alarming, and we must be convinced beyond a doubt that the law is so settled, before we would give our sanction to such a doctrine; and this is not the case upon authorities. *Willson vs. Watkins.* 51.
4. In no instance has the principle of law which protects the relations between landlord and tenant, been carried so far as in this case, which presents a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession afterwards for such a length of time, that the act of limitations has run out four times before he has done any act to assert his right to the land. *Ibid.* 48.
5. The plaintiff sued the defendant, as register of the United States land office in Ohio, for damages, for having refused to note on his books applications made by him for the purchase of land within his district. The declaration charged the register with this refusal, the lands had never been applied for nor sold, and were at the time of the application liable to be so applied for and sold. The statute of limitations is a good plea to the suit. *M'Cluny vs. Silliman.* 276.
6. It is a well settled principle that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction. *Ibid.* 276.
7. Under the thirty-fourth section of the judiciary act of 1789, the acts of limitations of the several states, where no special provision has been made by congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts. *Ibid.* 277.
8. Construction of the statute of limitations of the state of Ohio. *Ibid.* 278.
9. Where the statute of limitations is not restricted to particular causes of action, but provides that the action, by its technical denomination, shall be barred if not brought within a limited time, every cause for which such action may be prosecuted is within the statute. *Ibid.* 278.
10. In giving a construction to the statute of limitations of Ohio, the action being barred by its denomination, the court cannot look into the cause of action. They may do this in those cases where actions are barred for causes specified in the statute; for the statute only operates against such actions, when prosecuted on the grounds stated. *Ibid.* 278.
11. Of late years the courts in England and in this country have considered statutes of limitations more favourably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction, to evade the effect of those statutes. By requiring those who complain of injuries to seek redress by action at law within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation. *Ibid.* 278.

MISNOMER.

1. A commission issued in the name of Ricard *M.* Meade, the name of the plaintiff being Richard *W.* Meade. This is a clerical error in making out the commission, and does not affect its execution. *Keene vs. Meade.* 6.
2. It may well be questioned whether the middle letter of a name forms any part of the christian name of a party. It is said the law knows only of one christian name, and there are adjudged cases strongly countenancing, if not fully establishing, that the entire omission of a middle letter is not a misnomer or variance. *Ibid.* 7.
3. The misnomer of a county, in a patent for land, will not vacate the patent. It will admit of explanation, and if explanation can be received, the patent in which the misnomer is found, is not absolutely void. *Lessee of Stringer vs. Lessee of Young.* 344.

PATENT FOR LANDS.

1. Objections which are properly overruled, when urged against a legal title, in support of an equity, dependent entirely on a survey of land for which a patent has been issued, can have no weight when urged against a patent regularly issued in all the forms of law. *Lessee of Stringer vs. Lessee of Young.* 340.
2. In Virginia, the patent is the completion of the title, and establishes the performance of every pre-requisite. No inquiry into the regularity of those preliminary measures, which ought to precede it, is made in a trial at law. No case has shown that it may be impeached at law; unless it be for fraud. Not legal and technical, but actual and positive fraud, in fact, committed by the person who obtained it; and even this is questioned. *Ibid.* 340.

PLEAS AND PLEADING.

1. In the correct order of pleading it is necessary, that the facts of the plea should be traversed by the replication, unless matter in avoidance be set up. It is not sufficient that the facts alleged in the replication be inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea. *United States vs. Buford.* 31.
2. The act of Virginia, passed in 1792, authorises a defendant to plead and demur in the same case. *Fowle vs. The Common Council of Alexandria.* 409.
3. The party who demurs to evidence, seeks thereby to withdraw the consideration of the facts from the jury; and is therefore bound to admit not only the truth of the evidence, but every fact which that evidence may legally conduce to prove in favour of the other party. And if upon any view of the facts, the jury might have given a verdict against the party demurring, the court is also at liberty to give judgment against him. *Thornton vs. The Bank of Washington.* 40.

PRACTICE.

1. Where an appeal has been dismissed, the appellant having omitted to file a transcript of the record within the time required by the rule of court, an official certificate of the dismissal of the appeal may not be given by the clerk during the term. The appellant may file the transcript with

PRACTICE.

the clerk during the term, and move to have the appeal reinstated. To allow such certificate would be to prejudge such a motion. *The United States et al. vs. Swan.* 68.

2. In a writ of right the tenant may, on the mise joined, set up a title out of himself and in a third person. If any thing which fell from this court in the case of *Greene vs. Liter.* 3 Cranch, 229, can be supposed to give countenance to the opposite doctrine, it is done away by the explanation given by the court in *Greene vs. Watkins.* 7 Wheaton, 31. It is there laid down that the tenant may give in evidence the title in a third person for the purpose of disproving the defendant's *seisin*: that a writ of right does bring into controversy the mere right of the parties to the suit; and if so, it by consequence authorises either party to establish by evidence that the other has no right whatever in the demanded premises; or that his mere right is inferior to that set up against him. *Inglis vs. The Trustees of the Sailor's Snug Harbour.* 133.
3. In a writ of right on the mise joined on the mere right, under a count for the entire right, a defendant may recover a less quantity than the entirety. *Ibid.* 135.
4. Where the point on which the judges of the circuit court divided in opinion was not certified, but the point of difference was to be ascertained from the whole record, the court refuse to take jurisdiction of the case. *D'Wolf vs. Usher.* 269.
5. The plaintiff in error having died while the cause was held under advisement, the judgment was entered *nunc pro tunc*, as on the first day of this term. *Clay vs. Smith.* 411.
6. The practice has uniformly been, since the seat of government was removed to Washington, for the clerk of the court to enter at the first term to which any writ of error or appeal is returnable, in cases in which the United States are parties, the appearance of the attorney general of the United States. This practice has never been objected to. The practice would not be conclusive against the attorney general, if he should at the first term withdraw his appearance, or move to strike it off. But if he lets it pass for one term, it is conclusive upon him, as to an appearance. The decisions of this court have uniformly been, that an appearance cures any defects in the forms of process. *Farrar and Brown vs. The United States.* 459.
7. The subpoena issued on the filing of a bill in which the state of New Jersey were complainants, and the state of New York were defendants, was served upon the governor and attorney general of New York sixty days before the return'day, *the day of the service and return inclusive.* This being irregular, a second subpoena issued, which was served on the governor of New York only, the attorney general being absent. There was no appearance by the state of New York. *By the Court:* This is not like the case of several defendants, where a service on one might be good, though not on another. Here the service prescribed by the rule is to be on the governor, and on the attorney general. A service on one is not sufficient to entitle the court to proceed. *The State of New Jersey vs. The State of New York.* 461.

PRACTICE.

8. Upon an application by the counsel for the state of New Jersey, that a day might be assigned to argue the question of the jurisdiction of this court to proceed in the case, the court said they had no difficulty in assigning a day. It might be as well to give notice to the state of New York, as they might employ counsel in the interim. If, indeed, the argument should be merely ex parte, the court could not feel bound by its decision, if the state of New York desired to have the question again argued. *Ibid.* 464.
9. A notice was given by the solicitors for the state of New Jersey to the governor of the state of New York, dated the 12th of January 1830, stating that a bill had been filed on the equity side of the supreme court, by the state of New Jersey, against the people of the state of New York, and that on the 13th of February following, the court would be moved in the cause for such order as the court might deem proper, &c. Afterwards, on the day appointed, no counsel having appeared for the state of New York, on the motion of the counsel for the state of New Jersey, for a subpoena to be served on the governor and attorney general of the state of New York: the court said, as no counsel appears to argue the motion on the part of the state of New York; and the precedent for granting it has been established, upon very grave and solemn argument, the court do not require an ex parte argument in favour of their authority to grant the subpoena, but will follow the precedent heretofore established. The state of New York will be at liberty to contest the proceeding at a future time in the course of the cause, if they shall choose so to do. *Ibid.* 466.

PRINCIPAL AND AGENT.

Agent and principal.

PRIORITY OF THE UNITED STATES.

1. Twenty-three cases of silk were imported from Canton in the ship Rob Roy into the port of Boston, consigned to George D'Wolf and John Smith. After the arrival of the vessel with the merchandize on board, the collector caused an inspector of the customs to be placed on board. Soon afterwards, and prior to the entry of the merchandize, and prior to the payment or any security for the payment of the duties thereon, the merchandize was attached by the deputy sheriff of the county, in due form of law, as the property of G. D'Wolf and J. Smith, by virtue of several writs of attachment issued from the court of common pleas for the county of Suffolk, at the suit of creditors of G. D'Wolf and J. Smith. These attachments were so made prior to the inspector's being sent on board the vessel. At the time of the attachment, the sheriff offered to give security for the payment of the duties on the merchandize, which the collector declined accepting. The merchandize was sent to the custom house stores by the inspector, and several days after, the custom house store keeper gave to the deputy sheriff an agreement signed by him, reciting the receipt of the merchandise from the inspector; and stating, "I hold the said merchandize to the order of James Dennis, deputy sheriff." The marshal of the United States afterwards attached, took, and sold the merchandize under writs and process, in

PRIORITY OF THE UNITED STATES.

favour of the United States, against George D'Wolf; which writs were founded on duty bonds, due and unpaid, for a larger amount than the value of the merchandize, given before by D'Wolf and Smith; who, before the importation of the merchandize, were indebted to the United States on various bonds for duties, besides those on which the suits were instituted. Held, that the attachments issued out of the court of common pleas of the county of Suffolk, did not affect the rights of the United States to hold the merchandize until the payment of the duties upon them; and that the merchandize was not liable to any attachment by an officer of the state of Massachusetts, for debts due to other creditors of George D'Wolf and John Smith. *Harris vs. Dennis.* 292.

2. The United States have no general lien on merchandize, the property of the importer, for duties due by him upon other importations. The only effect of the first provision in the sixty-second section of the act of 1799, ch. 128, is that the delinquent debtor is denied at the custom house any further credit for duties, until his unsatisfied bonds are paid. He is compellable to pay the duties in cash, and upon such payment he is entitled to the delivery of the goods imported. The manifest intention of the remaining clause in the section, is to compel the original consignee to enter the goods imported by him. *Ibid.* 302.
3. No person but the owner or original consignee, or in his absence or sickness, his agent or factor, is entitled to enter the goods at the custom house, or give bond for the duties, or to pay the duties (sec. 36 and 62). Upon the entry the original invoices are to be produced and sworn to; and the whole objects of the act would be defeated by allowing a mere stranger to make the entry, or take the oath prescribed on the entry. *Ibid.* 304.
4. The United States having a lien on goods imported for the payment of the duties accruing on them, and which have not been secured by bond, and being entitled to the custody of them from the time of their arrival in port until the duties are paid or secured; any attachment by a state officer is an interference with such lien and right to custody; and, being repugnant to the laws of the United States, is void. *Ibid.* 305.
5. The acknowledgement of the custom house store keeper, that he holds goods, upon which the duties have not been secured or paid, subject to an attachment issued out of a state court at the suit of a creditor of the importer, was a plain departure from his duty, and is not authorised by the law of the United States, and cannot be admitted to vary the rights of the parties. *Ibid.* 305.

PROMISSORY NOTES.

1. An action was brought by the Union Bank of Georgetown against George B. Magruder as indorser of a promissory note drawn by George Magruder. The maker of the note died before it became payable, and letters of administration to his estate were taken out by the indorser. No notice of the non-payment of the note was given to the indorser, or any demand of payment made until the institution of this suit. Held, that the indorser was discharged, and his having become the administrator of the drawer does not relieve the holder from the obligation to demand payment of the note, and to give notice thereof to the indorser. The

PROMISSORY NOTES.

general rule, that payment must be demanded from the maker of a note, and notice of non-payment forwarded to the indorser within due time, in order to render him liable, is so firmly settled that no authority need be cited to support it. Due diligence to obtain payment from the maker is a condition precedent, on which the liability of the indorser depends. *Magruder vs. The Bank of Georgetown.* 90.

2. A note was discounted at the office of discount and deposit of the bank of the United States in the city of Washington, for the accommodation of the drawer, indorsed by Magruder and by M'Donald; neither of the indorsers receiving any value for his indorsement, but indorsing the note at the request of the drawer, without any communication with each other. The note was renewed from time to time, under the same circumstances, and was at length protested for non-payment: and separate suits having been brought by the bank against the indorsers, the drawer being insolvent, judgments in favour of the bank were obtained against both the indorsers. The bank issued an execution against Magruder, the first indorser, and he having paid the whole debt and costs, instituted this suit against M'Donald, the second indorser, for a contribution, claiming one half of the sum so paid by him in satisfaction of the judgment obtained by the bank. Held, that he was not entitled to recover. *M'Donald vs. Magruder.* 470.
3. That a prior indorser is, in the regular course of business, liable to his indorsee, although that indorsee may have afterwards indorsed the note, is unquestionable. When he takes up the note he becomes the holder as entirely as if he had never parted with it, and may sue the indorsees for the amount. The first indorser undertakes that the maker shall pay the note, or that he, if due diligence be used, will pay it for him. This undertaking makes him responsible to every holder, and to every person whose name is on the note subsequent to his own, and who has been compelled to pay its amount. *Ibid.* 474.
4. The indorser of a promissory note, who receives no value for his indorsement from a subsequent indorser, or from the drawer, cannot set up the want of consideration received by himself; he is not permitted to say that the promise is made without consideration; because money paid by the promisee to another, is as valid a consideration as if paid to the promisor himself. *Ibid.* 476.

PUBLIC AGENTS.

1. When money of the United States has been received by one public agent from another public agent, whether it was received in an official or private capacity, there can be no doubt but that it was received to the use of the United States; and they may maintain an action against the receiver for the same. *The United States vs. Buford.* 28.
2. B., a deputy commissary general of the United States, received from M., a deputy quarter master general of the United States, the sum of \$10,000, and acknowledged the same by a receipt signed by him with his official description. The United States had a right to treat M. as their agent in the transaction, by making B. their debtor, and to an action brought against him for money had and received, the statute of limitations is no bar. *Ibid.* 29.

REPORTER OF THE SUPREME COURT OF THE U. STATES.

Certified copies of the opinion of the court, delivered in cases decided by the court, are to be given by the reporter, and not by the clerk of the court. *Anonymous.* 897.

SLAVE TRADE.

1. Construction of statutes of the United States.
2. The offence against the law of the United States, under the seventh section of the act of congress, passed the 2d of March 1807, entitled "an act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States from and after the first of January 1808," is not that of importing or bringing into the United States persons of colour with intent to hold or sell such persons as slaves, but that of hovering on the coast of the United States with such intent; and although it forfeits the vessel and any goods or effects found on board, it is silent as to disposing of the coloured persons found on board, any further than to impose a duty upon the officers of armed vessels who make the capture to keep them safely, to be delivered to the overseers of the poor or the governor of the state or persons appointed by the respective states to receive the same. *The United States vs. Preston.* 65.
3. The persons of colour held as slaves under an order of the district court of Louisiana, in a case in which the decree was afterwards reversed, were illegally sold, and they are free. *Ibid.* 57.

STATUTE OF CHARITABLE USES.

See the case of *Inglis vs. The Trustees of the Sailor's Snug Harbour,* 99, and the Appendix, on the construction and application of this statute to devises and gifts to charitable uses in the United States.

STATUTE OF LIMITATIONS.

Limitation of actions.

STATUTES OF THE UNITED STATES.

1. Construction of statutes, 1, 2, 3, 4, 5, 6.
2. This court has been often called upon to consider the sixteenth section of the judiciary act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. *Boyce's Executors vs. Grundy.* 210.

SUABILITY OF STATES.

1. The subpoena issued on the filing of a bill in which the state of New Jersey were complainants, and the state of New York were defendants, was served upon the governor and attorney general of New York, sixty days before the return day, the day of the service and return inclusive. A second subpoena issued, which was served on the governor of New York only, the attorney general being absent. There was no appearance by the state of New York. *By the Court:* This is not like the case of several defendants, where a service on one might be

SUABILITY OF STATES.

- good, though not on another. Here the service prescribed by the rule is to be on the governor, and on the attorney general. A service on one is not sufficient to entitle the court to proceed. *The State of New Jersey vs. The State of New York.* 461.
2. Upon an application by the counsel for the state of New Jersey, that a day might be assigned to argue the question of the jurisdiction of this court to proceed in the case, the court said they had no difficulty in assigning a day. It might be as well to give notice to the state of New York, as they might employ counsel in the interim. If, indeed, the argument should be merely ex parte, the court could not feel bound by its decision, if the state of New York desired to have the question again argued. *Ibid.* 461.
 3. A notice was given by the solicitors for the state of New Jersey to the governor of the state of New York, dated the 12th of January 1830, stating that a bill had been filed on the equity side of the supreme court, by the state of New Jersey, against the people of the state of New York, and that on the 18th of February following, the court would be moved in the case for such order as the court might deem proper, &c. Afterwards, on the day appointed, no counsel having appeared for the state of New York, on the motion of the counsel for the state of New Jersey, for a subpoena to be served on the governor and attorney general of the state of New York, the court said: as no counsel appears to argue the motion on the part of the state of New York, and the precedent for granting it has been established, upon very grave and solemn argument, the court do not require an ex parte argument in favour of their authority to grant the subpoena, but will follow the precedent heretofore established. The state of New York will be at liberty to contest the proceeding at a future time in the course of the cause, if they shall choose so to do. *Ibid.* 461.

SUPREME COURT OF THE UNITED STATES.

1. The supreme court of the United States has not jurisdiction by habeas corpus or otherwise, in a case of a criminal prosecution instituted in a circuit court of the United States, for the purpose of examining the judgment and proceedings of that court in such cases. *Ex parte Tobias Watkins.* 192.
2. Habeas corpus.
3. Jurisdiction.

TREASURY STATEMENTS.

1. An account stated at the treasury department which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of congress. A treasury statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books. In these cases the officers may well certify, for they must have official knowledge of the facts stated. *The United States vs. Buford.* 29.
2. But when moneys come into the hands of an individual, not through the officers of the treasury, or in the regular course of official duty, the books of the treasury do not exhibit the facts, nor can they be known to the

TREASURY STATEMENTS.

officers of the department. In such a case the claim of the United States for money thus in the hands of a third person must be established, not by a treasury statement, but by the evidence on which that statement was made. *Ibid.* 29.

TRIAL BY JURY.

1. The amendment to the constitution of the United States, by which the trial by jury was secured, may, in a just sense, be well construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. *Parsons vs. Bedford et al.* 447.
2. The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the union. *Ibid.* 446.

TRUST AND TRUSTEE.

Whenever a person by will gives property, and points out the object, the property, and the way in which it shall go, a trust is created, unless he shows clearly, that his desire expressed, is to be controlled by the trustee, and that he shall have an option to defeat it. *Inglis vs. The Trustees of the Sailor's Snug Harbour.* 119.

USURY.

1. The taking of interest in advance upon the discount of a note in the usual course of business by a banker, is not usury. This has been long settled, and is not now open for controversy. *Thornton vs. The Bank of Washington.* 40.
2. The taking of interest for sixty-four days on a note is not usury, if the note given for sixty days, according to the custom and usage in the banks at Washington, was not due and payable until the sixty-fourth day. In the case of *Renner vs. The Bank of Columbia,* 9 Wheat. 581, it was expressly held, that under that custom the note was not due and payable before the sixty-fourth day, for until that time the maker could not be in default. *Ibid.* 40.
3. Where it was the practice of the party who had a sixty day note discounted at the bank of Washington, to renew the note by the discount of another note on the sixty-third day, the maker not being in fact bound to pay the note according to the custom prevailing in the district of Columbia; such a transaction on the part of the banker is not usurious, although on each note the discount for sixty-four days was deducted. Each note is considered as a distinct and substantive transaction. If no more than legal interest is taken upon the time the new note has to run, the actual application of the proceeds of the new note to the payment of the former note before it comes due, does not of itself make the transaction usurious. Something more must occur. There must be a contract between the bank and the party at the time of such discount, that the party shall not have the use and benefit of the proceeds until the former note becomes due, or that the bank shall have the use and benefit of them in the mean time. *Ibid.* 42.

VENDOR AND VENDEE.

See *Parsons vs. Armor and Oakey*, 412.

VIRGINIA LAND TITLES.

Land and land titles, 1, 2, 3, 4.

WILLS AND TESTAMENTS.

The intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail; although in giving effect to it, some words should be rejected or so restrained in their application as to change their literal meaning in the particular instance. *Finlay et al. vs. King's Lessee*. 377.

WRIT OF ERROR.

1. Amendment, 1.
2. If the writ of error be brought by the plaintiff below, then the sum which the declaration shows to be due may be still recovered, should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is still in dispute. *Gordon vs. Ogden*. 34.
3. But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the circuit court, and consequently the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties. *Ibid.* 34.
4. The court has no authority, on a writ of error from a state court, to declare a state law void on account of its collision with a state constitution; it not being a case embraced in the judiciary act, which gives the power of a writ of error to the highest judicial tribunal of the state. *Jackson vs. Lamphier*. 280.
5. The record consisted of the petition, the answer, the whole testimony, as well depositions as documents, introduced by either party, and the fiat of the judge, that Armor, the plaintiff below, recover the debt as demanded. The difficulty is to decide under what character we shall consider this reference to the revising power of this court. If treated strictly as a writ of error, it is certainly not an attribute of that writ, according to the common law doctrine, to submit the testimony as well as the law of the case to the revision of this court; and then there is no mode in which the court can treat this case, but in the nature of a bill of exceptions. The court is not at liberty to treat this case as an appeal in a court of equity jurisdiction, under the act of 1803; because the party has not brought up his cause by appeal, but by writ of error. *Parsons vs. Armor and Oakey*. 425.

WRIT OF RIGHT.

1. In a writ of right the tenant may, on the mise joined, set up a title out of himself and in a third person. If any thing which fell from this court in the case of *Greene vs. Liter*, 8 Cranch, 229, can be supposed to give countenance to the opposite doctrine, it is done away by the explanation given by the court in *Greene vs. Watkins*, 7 Wheaton, 31. It is there laid down that the tenant may give in evidence the title in a third person for the purpose of disproving the defendant's *seisin*: that a

WRIT OF RIGHT.

writ of right does bring into controversy the mere right of the parties to the suit ; and if so, it by consequence authorises either party to establish by evidence that the other has no right whatever in the demanded premises : or that his mere right is inferior to that set up against him. *Juglis vs. The Trustees of the Sailor's Snug Harbour.* 133.

2. In a writ of right on the mise joined on the mere right, under a count for the entire right, a defendant may recover a less quantity than the entirety. *Ibid.* 135.

THE END.

















